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No. 92-1206

IN THE

SUPREME COURT OF THE UNITED STATES

October 1992 Term

ROBERT O. STUART,

Petitioner,

v.

WALTER WINTER, GOLDEN ENTERPRISES, INC., GOLDEN ENTERPRISES INTERNATIONAL, INC., and WALTER (WALTER W.) INVESTMENTS, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court of appeals in a diversity case is bound to follow state law of the forum state as its standard of review under the *Erie* doctrine.

2. Whether it is reversible error for the trial court to admit testimony of a party's attorney where the party has claimed privilege during discovery and continues that claim at trial.

3. Whether it is reversible error to exclude from evidence patent histories during cross-examination of a party's patent attorney when they are offered to impeach the patent attorney and the party.

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[1]/Pursuant to Supreme Court Rules 14.1(b) and 29.1, all parties appearing in the court below are listed herein in the case caption. Also appearing in the District Court was American Telephone & Telegraph Co., Inc., issues pertaining to whom were bifurcated at the trial level and were not presented on appeal in the court below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on October 20, 1992.

OPINIONS BELOW

The Court of Appeals did not issue an opinion in this case. The judgment affirming the District Court is appended hereto. (App. A1) The Order of the Court of Appeals denying reargument is also appended. (App. A2) The judgment and opinion of the District Court are unreported but are appended hereto. (Apps. A3, A4)

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on October 20, 1992. The Order of the Court of Appeals denying re-argument was entered on October 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

Fla. Stat. Ann. Sec. 620.585 (1976); Ind. Code Sec. 23-4-1-6 (1989). (App. A28)

STATEMENT OF THE CASE

Course of Proceedings and Dispositions Below

Petitioner Robert O. Stuart (hereinafter "Stuart"), filed this action on July 28, 1989. Jurisdiction in the District Court was founded upon 28 U.S.C. Sec. 1332 regarding diversity of citizenship. (R 1-1) Stuart alleged in his complaint that he and respondent Walter Winter (hereinafter "Winter") entered into an oral partnership in June, 1983 in Indianapolis, Indiana to design, patent, develop and market a piece of telephone equipment later called Personalized Response System, or PRS. The complaint sought an accounting from Winter and respondent Golden Enterprises, Inc. (hereinafter "Golden"), and the imposition of a constructive trust for the PRS patents and proceeds from the sale of PRS.[2/]

On April 25, 1990, the district court granted Stuart a preliminary injunction (R 4-119) freezing the assets of Winter and Golden

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[2/]On November 3, 1989, respondents filed a third-party complaint, which was amended on December 7, 1989, against American Telephone and Telegraph Co. ("AT&T"). (R 1-29, R 2-43) On May 2, 1990, those proceedings were stayed pending resolution of the partnership issue. (R 5-124)

and granting Stuart leave to amend his complaint by adding Winter Investments, Inc. and Golden Enterprises International, Inc. as defendants. (R 4-122) The district court entered an Order on May 2, 1990, bifurcating the proceedings for discovery on the determination of the partnership and the rendering of an accounting. (R 5-124) On December 7, 1990, the district court ordered the filing of a pre-trial stipulation bifurcating for trial the issue of the existence of a partnership. (R 9-230) From February 14 to 22, 1991, a full trial was held without a jury. On June 5, 1991, the district court signed a Memorandum Opinion and Order finding that no partnership existed and finding in favor of the respondents. (R 11-293) The Opinion and Order was entered on June 12, 1991, and judgment was entered on July 8, 1991 (R 11-295) in favor of respondents and dissolving the injunction. On June 26, 1991, petitioner filed a Notice of Appeal from the judgment and the Order signed on June 5, 1991 and entered on June 12, 1991. (R 11-294) Jurisdiction in the Court of Appeals was founded upon 28 U.S.C. Secs. 1291 and 1292(a). The Court of Appeals affirmed the District Court on October 20, 1992, without opinion. (App. A1)

Statement of Facts

Stuart is a citizen and resident of Indiana. Winter is a citizen and resident of Florida. The corporate respondents are Florida entities, under the control of Winter, with their principal places of business in Florida.

Winter, who was an engineer with experience in devices and programs for telephone operators, controlled and managed Golden Enterprises, Inc. (R 20-pp. 3-7) In June, 1983, Stuart held a high-level position with Indiana Bell Telephone Company (''Indiana Bell''). He had over twenty years experience in managing telephone company operator services. This experience included substantial expertise in the analysis of operator work time and service quality. (R 13-pp. 223-227).

Beginning in December, 1982 through May, 1983, Stuart tested the feasibility of what later came to be called the PRS concept. (R 13-pp. 132 and 227) He did so with the assistance of his son, Dr. Robert O. Stuart II, who tape-recorded hundreds of operator responses to directory assistance calls placed from Stuart's residence as part of a pilot study. (R 12-7; R 13-234) From the pilot

study, Stuart began to conceive the idea of a mechanized voice response system. (R 12-pp. 24-28) The pilot study was the forerunner of PRS. (R 12-25)

The equipment used was purchased by Dr. Stuart for the study. (R 13-244) Dr. Stuart was paid by Stuart for the work. (Pl. Ex. 20; R 12-35; R 18-pp. 13-15) Dr. Stuart was conducting original research and supplied the results to his father. (R 18-pp. 10, 30-33) Stuart, while employed by Indiana Bell at the time, was not in a position to do research or development work for Indiana Bell. (R 13-244)

The pilot study was used by Stuart to conclude that there was a 1.5 second time lag between the arrival of a call and the operator's answer, the reduction of which would result in a substantial potential cost savings to telephone companies. (R 12-pp. 10, 14; R 13-pp. 233-234) The results of the study were later confirmed by a study conducted by AT&T at Jacksonville. (R 14-pp. 69-70; Pl. Ex. 13) In 1984, Winter wrote a letter of recommendation recognizing Dr. Stuart's contribution to PRS. (Pl. Ex. 1; R 12-33)

Stuart first met Winter on January 20, 1983, when Winter visited Indiana to sell telephone operator training equipment for Golden. Stuart discussed the research he was conducting with his son. Following their initial meeting, Stuart and Winter conversed regularly, usually by telephone. In April 1983, Stuart provided Winter with preliminary tapes from the research. (R 13-pp. 235-238) In June, 1983, the tapes were complete, although further studies followed by Stuart, Winter and Dr. Stuart. During this early formational stage, Stuart and Winter discussed in greater detail the mechanized concept for PRS. (R 13-pp. 239-50, 244-247)

Stuart and Winter met in June, 1983, at which time Stuart testified they formed a partnership. Joyce Ann Drabing testifed that she witnessed the meeting in her office on a Monday in June, 1983[3], to wit:

> A Mr. Stuart, Bob, brought Walt [Winter] into my office.

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[3]/Winter admits to being in Indianapolis on June 20, 1983, and having a prearranged meeting with Stuart. (R 19-pp. 256-262) Stuart thought the meeting was on June 13, but testified it could have been on June 20. (R 13-251) Both June 13 and 20, 1983 were on Mondays. (Judicial Notice).

Q All right; and, what did they say as best you can recall?

A Bob brought Walt into my office and he introduced him as Walter Winter and do you want me to proceed from there?

Q Sure. Sure, tell us the story of what happened?

A Well, he introduced him and Walt started talking about, I don't know, some training tapes or something he had and I didn't really understand it all but Bob seemed to. And, Bob said no, Walt, he said that's not what I want. What I want is an automatic device, a mechanism that comes in immediately after the zip tone and it is in the operator's own voice and with the right phrase, the correct response, but it can't sound like a computer. He said it cannot sound like a computer. The customer must not know it's a computer.

* * *

A Well, it is common courtesy for a boss always to drop by the manager's office to say goodbye, whatever, but as they were approaching my office, Bobby would hear him say it is my invention, I have done my own research.

* * *

THE WITNESS:

Well, Bob said it is my invention, I have done my own research. He said I know how to sell it, I know how to market it and then he said but it has got to be patented. And, he said can you do it to Walt and Walt didn't respond. And, Bob then said there are millions to be made and then Walt said something like I can do it and I can probably have it to you in about six weeks.

At this point, Bob said are we partners, Walt? And, Walt said we're partners and they shook hands in front of me. And, then Bob said well, let's go do it partner and they left my office.

BY MR. MCFADDEN:

Q Now, this took place right in front of you?

A Yes, directly in front of me.

(R 12-pp. 44-47)

Winter testified that such a meeting did not take place and that he never entered into a deal with Stuart. (R 21-308) Cheri Erwin testified for the respondents that she did not believe Stuart was the originator of PRS. (R 20-57)

Stuart and Winter agreed to obtain a patent for PRS. (R 13-pp. 257, 261-263) The deal was that Winter would perform the design work and obtain a patent for the device, while Stuart, who contributed the initial concept, would provide the technical parameters needed to make the device compatible with operator procedures and equipment, along with providing marketing assistance. (R 13-pp. 251-257) Their deal contemplated that Stuart would remain a silent partner until the device was developed and a patent obtained. Stuart would then move to Florida and become a visible partner with Winter in the enterprise. Stuart and Winter agreed to be equal partners. (R 13-276)

Winter took the first step in the patenting process by ordering a patent search in August, 1983. (R 13-268) Diagram and schematics were developed between August and October, 1983. (Pl. Ex. 31) The initial efforts of the partnership, according to Stuart, were directed at evaluating the market and potential competition, preparation of the patent application and developing the bench model PRS device. The bench model was developed between September and November 1983. (Pl. Ex. 31; R 13-270)

In reliance on the deal with Winter, Stuart made a decision to leave his position at Indiana Bell and join AT&T on January 1, 1984. He discussed the decision in advance with Winter, the reason being that he wanted to be able to concentrate on PRS for the Regional Bell Operator Companies (''RBOC'') market which was different from the AT&T market.[4]/ (R 13-pp. 264-265)

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[4]/Under the divestiture Plan of Reorganization approved by the Court in *United States v. Western Electric*, 569 F. Supp. 1057 (D.D.C. 1983), the Bell Systems were divided between AT&T and the operating telephone companies. Operator service equipment and employees for directory assistance within the operat-

Stuart had developed a business plan for PRS in 1983. The plan was aimed primarily at marketing PRS to the RBOCs that were to be divested from AT&T. The plan was also aimed at directory assistance calls. Directory assistance services were to be undertaken directly by those companies shortly after divestiture. (R 13-pp. 264-266, 275-276)

Stuart and Winter jointly managed and controlled the patenting process and the development of the PRS device. They agreed to adopt the trade name "PRS" for the device in later 1983. (R 13-pp. 271-272) They consulted frequently on the patent application filed on April 18, 1984. In a visit to Melbourne, Florida in April, 1983, Stuart made a number of suggested changes in the device that were adopted before the patent application was filed. (R 14-pp. 19-30)

Winter asked Stuart to come to Melbourne in April, 1984 to review the bench model. (R 14-pp. 19-30) At the April 6, 1984, meeting at Golden's offices, Stuart advised Winter that the size of the device and proposed placement position on telephone operator equipment would restrict sales. (R 14-pp. 26-30) Winter admitted that Stuart suggested changes in the bench model in April, 1984. (R 19-pp. 291-292)

During this meeting, Stuart and Winter agreed to expedite the patenting process so that the patent application was on file prior to a presentation of the PRS bench model on May 24, 1984 in Indianapolis to a group of AT&T executives. (R 14-pp. 21-22; R 19-pp. 298-299) Stuart wanted the bench model converted into a prototype before the presentation. Winter agreed. (R 14-28) The objective was not sell to AT&T, but to obtain a validation by AT&T of the product. (R 14-pp. 22-23) If AT&T found it acceptable, it would have validated it in the telephone industry. (R 19-300)

In early May, 1984, Winter went to Indianapolis where he and Stuart tested the prototype. Winter then spent most of the week before the presentation working with Stuart on the subject. Stuart

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ing telephone companies' service areas were assigned to those companies called RBOCs. Plan of Reorganization, pp. 28-29 and 258. Prior to divestiture, most of the telephone equipment used by AT&T's operating telephone companies was designed by Bell Laboratories and manufactured by Western Electric, both owned by AT&T. Under the Modified Final Judgment and Plan of Reorganization, the divested operating telephone companies are prohibited from research and manufacturing. Indiana Bell was not engaged in manufacturing or producing telephone equipment and still is prohibited from doing so.

was actively involved in set-up for demonstration in early May, 1984. (R 19-pp. 292-295) Stuart and one of his assistants, Cheri Erwin, made the presentation on May 24, 1984, acting on behalf of the partnership. (R 14-pp. 32-39)

During these and other meetings, Stuart and Winter frequently referred to each other as PRS partners. Pamela S. Wright and Richard Beuoy witnessed such statements at the meeting prior to the May 24, 1984 presentation. (Deposition of Richard Beuoy, taken March 23, 1990, pp. 78-85 (R 20-34; R 4-93); Deposition of Pamela Wright, taken March 2, 1990, pp. 4-8 (R 20-pp. 34-35))

In June, 1984 and during the last quarter of 1985, Stuart and Winter used Jack W. Alexander, a printing contractor in Indianapolis, to prepare view graph slides that were used by Winter in making marketing or sales presentations to telephone companies. (Pl. Exs. 9, 23, 24, 25) Alexander testified that in dealing with him, Stuart and Winter referred to each other as partners. Some of the slides were paid for by Stuart and some by Winter. (R 13-pp. 103-119, 125, 127-128)

Stuart and Winter had "hundreds of discussions concerning the patent while the application was pending during the summer and fall of 1984. (R 14-pp. 54-55) Stuart and Winter had agreed that because of his status as a silent partner, Stuart's name would not appear on the patent. (R 13-133; R 14-pp. 84-85)

Stuart supplied Winter with specifications for the patent application. These specifications consisted of design requirements to insure that PRS would be marketable to the telephone industry. (R 14-pp. 19-30) Winter also encouraged Stuart to prepare an article on PRS, allegedly for publication in an industry trade journal, which he did. Winter admitted that he used the information to support the patent application. The information in the article appeared in the patent abstract and background. (Pl. Exs. 8, 16)

Around June 16, 1984, Stuart and his family visited Melbourne and Stuart received from Winter the PRS device to be used in another presentation to promote the trial. Stuart, acting on behalf of he and Winter, made this presentation to a group of AT&T executives on June 21, 1984 in Basking Ridge, New Jersey. (R 14-pp. 42-46, 57-58)

Stuart was accompanied to Melbourne by his wife and daughter. His wife, Pam, testified that they were lavishly entertained by Wanda Jo Morris, an officer of Golden and a close associate of

Winter. Morris acknowledged to them the partnership between Stuart and Winter and encouraged them to move to Florida. (R 14-pp. 42-46; R 18-pp. 5-12; R 19-pp. 305-309)

Stuart worked with Winter on marketing to the RBOC telephone company market. Those efforts included the preparation in September, 1984 of a lease versus purchase analysis of PRS as compared to a competitor's product. The analysis was essential to demonstrate to customers that purchase, as opposed to lease, increased the cost savings attributable to PRS. (Pl. Ex. 10)

Winter called Stuart virtually daily during this effort for information on call volumes, number of operators, productivity levels and cost. Winter also asked GTE Corporation to call Stuart for a PRS recommendation. In response, Stuart discussed PRS with GTE Corporation in several subsequent calls. From those calls, Stuart was able not only to promote PRS to GTE Corporation, but also to alert Winter to a potential competitor for this customer. (R 14-pp. 59-63)

Stuart and Winter also referred to each other as partners in conducting business matters with other outsiders. On November 5, 1985, they interviewed Charles W. Holder for possible employment with partnership. Holder testified that during the interview they referred to a joint enterprise and used the term "we" to discuss this effort. (R 12-pp. 81-85, 99; R 14-pp. 79-81)

Dr. Alden McLellan, who was responsible for promoting state financial assistance for new enterprises in Indiana, testified that he listened to several calls between Stuart and Winter in which they discussed patent strategy and the preparation of the application. He testified that Stuart and Winter referred to each other as partners during those conversations. (R 13-pp. 143-144, 152-154, 155-157, 161-165)

After Stuart resigned his position with Indiana Bell on January 1, 1984, and accepted a position with AT&T, he advised an AT&T vice president of his ownership interest in PRS. (R 14-pp. 35-38; Deposition of Janet Nordin, taken November 27, 1989, pp. 5, 39-41 (R 20-35; R 3-60)) Stuart signed an intellectual property agreement with AT&T on March 5, 1985, long after PRS was conceived and a patent was applied for. (Pl. Ex. 12) There is no evidence of such an agreement between Stuart and Indiana Bell. AT&T and

Indiana Bell were completely divested of each other in January 1984, and became completely independent of one another.[5/]

Stuart consulted with both Winter and an outside attorney before signing the agreement. Both advised that the agreement would not affect PRS, which was essentially extant before March 5, 1985. (R 14-pp. 66-67; R 19-pp. 322-324)

On March 25, 1984, Stuart provided to Winter tables demonstrating annual cost savings from PRS. They discussed these tables by telephone. (Pl. Ex. 11; R 14-pp. 64-66) Stuart also supplied Winter in November, 1985 with information to be used in marketing to Ameritech, which showed savings for directory assistance and PRS. He also supplied him with information to market to other RBOCs. (R 14-pp. 71-78; Pl. Exs. 2, 14)

In September, 1985, these tables were translated into two items. The first item was a detailed calculation comparing total cost savings from a 1.0 second time savings per call to a 1.5 second time savings per call. The information also compared cost savings for various sized operator offices. The purpose was to make the information fungible to the varying operations of the Bell System and independent telephone companies. (Pl. Ex. 13; R 14-pp. 68-70)

Stuart also supplied Winter with extensive information on products or suppliers that were in competition with PRS. In November, 1985, Stuart provided information on competitive products offered by firms such as Rockwell and Eltrex. (R 19-pp. 319-323) This information included the business itinerary of Thomas Sullivan, the President of Eltrex, and a detailed cost savings comparison with the Eltrex device. Winter later acknowledged that the cost savings calculations were invaluable in making a PRS sale to the Pacific Telesis Group. The itinerary alerted Winter as to which companies Sullivan was trying to market for his competitive product. (R 19-pp. 323-329)

The Eltrex comparison demonstrated the cost savings advantages of PRS, which, unlike the Eltrex device, did not have to be reprogrammed after each operator's use. The Eltrex device was priced below PRS. Pacific Telesis leaned toward Eltrex because of the lower price. The comparison demonstrated that, by eliminating

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[5/]*See* note 4, *supra*.

reprogramming, PRS saved more operator labor expense than the Eltrex device. (Pl. Ex. 15)

Jo Morris testified that she was in charge of marketing PRS for Golden and that information provided by Stuart was of little value. Ms. Morris had little background in marketing sophisticated telephone equipment and did not understand the materials that Stuart had sent, but she never rejected or returned the material to Stuart. (R 22-pp. 67-73)

After Stuart supplied this information to Winter, Winter called Stuart to say that the Pacific Telesis sale was accomplished. The Pacific Telesis sale was the first major PRS purchase. Winter told Stuart that it was time for him to move Melbourne. (R 14-pp. 81-83) At a meeting on April 25, 1986, in Melbourne, Winter reiterated to Stuart that the first major sale of the device, to the Pacific Telesis Group, was a *fait accompli*. Stuart and Winter then discussed arrangements for Stuart to assume visible partner status. (R 14-pp. 81-83)

In a taped telephone conversation in July 1986, Winter and Stuart discussed the competition, future business plans, PRS enhancements and success of their enterprise in sales to a wide market. Winter acknowledged Stuart's equity interest in PRS in the July, 1986 taped conversation. (Pl. Exs. 17, 17a)

The first PRS patent was issued on November 18, 1986. (Patent No. 4697282, Pl. Ex. 16) Another patent was issued on September 29, 1987. (Patent No. 4623761, Pl. Ex. 16) The patents list Winter, *inter alia*, as an inventor, but not Stuart.

The patents were subsequently assigned by Winter and the other listed "inventors" to Golden. In a letter of July 27, 1988, Winter made it quite clear that he had no intention of honoring the partnership agreement or his obligations under it. (Pl. Ex. 18)

The testimony of Charles Wands, the patent attorney who prepared the PRS patents, was allowed by the trial court into the record. (*See* R 21-pp. 176-210) Wands testified, over objection, as to several matters concerning the background of the two PRS patents he prepared, including identification of the various people involved and sources relied upon in applying for and securing the patents. During discovery, respondents consistently withheld information that Wands could have provided, claiming privilege and confidenti-

ality.[6]/ Petitioner argued that Wands' testimony was incomplete and therefore unreliable.

The District Court at trial excluded Plaintiff's [Petitioner's] Tendered Exs. 34 and 35. (*See* R 21-pp. 209-210) These exhibits are the file histories of the patents for PRS, on record with the United States Patent Office. These exhibits were critical to Stuart being able to demonstrate the history behind the two patents. For example, although the first patent application was filed April 18, 1984, Plaintiff's [Petitioner's] Tendered Ex. 35 demonstrates that thereafter the Patent Office had lengthy ongoing communications with Wands in firming up the patent application and correcting certain deficiencies therein. Petitioner accordingly argued that the date the first application was filed was irrelevant since the filing of the application was merely the starting point for a lengthy alteration process during which Stuart continued to contribute. The language in Plaintiff's [Petitioner's] Ex. 8, an article on PRS written by Stuart, is very similar to the language used in the patent applications. Wands acknowledged the similarity. (R 21-207) For excluding Plaintiff's [Petitioner's] Exs. 34 and 35, petitioner argued that the court precluded Stuart from tracing his and Winter's input and arguing the same.

The District Court excluded these exhibits on the grounds that they were not listed on Plaintiff's [Petitioner's] exhibit list. However, these exhibits were offered during the course of cross-examination in the nature of rebuttal exhibits, and thus Petitioner argued that they need not have been so listed.

The judgment entered by the District Court (R 11-295) (App. A3) held that PRS was not designed or passed along by petitioner Stuart.

REASONS FOR GRANTING THE WRIT

1. This case raises issues that suggest a revisitation of *Hanna v. Plummer*, 380 U.S. 460 (1965) and application of the *Erie* doctrine. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). In the

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[6]/*See* Defendant's Motions for Protective Orders and Memoranda in Support, dated September 1, 1989 (R 1-9 and 10) and June 5, 1990. (R 5-136) *See also* Walter Winter Deposition, January 29, 1990, pp. 19-20. (R 3-69) (While not offered as a trial exhibit, Winter's deposition was filed with the District Court.)

diversity action at bar, the primary issue designated for trial was whether a partnership was formed between Stuart and Winter in June, 1983. (R 5-124) The formational event took place in Indiana. Much of the later activities took place in Florida. Although the parties stipulated pre-trial that Indiana law would apply to determine the formation and existence of a partnership, both Florida and Indiana have adopted the Uniform Partnership Act. *See* Ind. Code Secs. 23-4-1-1, *et seq.* (Ind. Code Sec. 23-4-1-6); Florida Stat. Ann. Sec. 620.56, *et seq.* (Florida Stat. Ann. Sec. 620.585). (App. A28)

On appeal, Petitioner argued that the standard of review to be used was whether the District Court's findings rested on an erroneous view of the law. Petitioner argued that whether a partnership was formed, the primary issue at trial, is a question of law, and thus that the clearly erroneous standard of Fed. R. Civ. P. 52(a), reserved for findings of fact, did not apply. The Court of Appeals, without opinion, apparently however treated the issue as a question of fact and therefore subject to review under Rule 52(a). Petitioner submits that this was error by the Court of Appeals.

Florida and Indiana differ on the standard of review to be used on appeal regarding the question of formation of a partnership. In *Uhrig v. Redding*, 8 So. 2d 4 (Fla. 1942), the Florida court clearly determined it as a question of law. The Indiana appellate court reviews it as a question of fact. *J.M. Schultz Seed Co. v. Robertson*, 451 N.E.2d 62 (Ind. Ct. App. 1983). Petitioner submits that under *Erie* and its progeny, the Court of Appeals was compelled to apply Florida law.[7]/

Under the "outcome determinative" test articulated in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), the Court of Appeals sitting in the same situation as the Florida Supreme Court would have applied Florida law and thus reviewed the issue as a question of law, since Florida law states that:

> It does not necessarily follow that there was no partnership, if it appears from the other facts that the parties intended one. The question to be determined is one of the law - i.e., whether

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[7]/The pre-trial stipulation in the trial court would have no bearing on the standard of review to be used in the appellate court. *See* discussion at pp. 15-16, *infra*.

> the facts as found by the chancellor and herein recited show that a partnership existed.

Uhrig v. Redding, 8 So. 2d at 5.

Both Indiana and Florida, under their respective partnership acts, define a "partnership" as an association of two or more persons to carry on a business for profit as co-owners. *See* Fla. Stat. Ann. Sec. 620.585; Ind. Code Sec. 23-4-1-6. (App. A28) In the case of *Wirtz v. Barnes Grocer Co.*, 398 F.2d 718 (8th Cir. 1968), the Eighth Circuit had occasion to interpret what constituted the analogous term "enterprise" in the context of the Fair Labor Standards Act of 1938, at 29 U.S.C. Sec. 203(r), which was defined as "the related activities performed (either through unified operation or common control) by a person or persons for a common business purpose." In finding an "enterprise" in *Wirtz*, the Court of Appeals stated:

> Appellees urge that under Rule 52(a) due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses and that we should not set aside findings of fact unless clearly erroneous. This is not the type of situation the rule was intended to cover. Credibility is not in issue. In issue are the conclusions of law as to what constitutes an enterprise and whether under the undisputed facts, an enterprise as defined in the Act, was shown.

Wirtz, 398 F.2d at 722. Rule 52(a) has not been applied to questions of law or "ultimate fact," such as the existence of a contract. *See Augusta Aviation, Inc. v. U.S.*, 671 F.2d 445 (11th Cir. 1982). The *Wirtz* analysis is consistent with both *Uhrig* and *Augusta Aviation*, which are indicative of the likelihood of a different result should the issue be determined as a question of law.

The majority opinion in *Hanna v. Plummer*, 380 U.S. at 467, cast limitations on the outcome determinative test of *Guaranty Trust*. Yet, an important distinction between *Hanna* and the case at bar is that in the former the issue revolved around displacement of a federal rule with a state rule. Here, no such displacement is involved. The question is not whether Rule 52(a) is in conflict with a state rule, but whether it should be applied at all. Specifically addressing questions of fact, Rule 52(a) has no application in the case at bar.

In his concurring opinion in *Hanna*, Mr. Justice Harlan expressed the view that the majority opinion was over-simplifying the rule in diversity cases, saying that:

> To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation. [Footnote omitted] If so, *Erie* and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.
>
> * * *
>
> So long as a reasonable man could characterize any duly adopted federal rule as "procedural," the Court, unless I misapprehend what is said, would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens.

380 U.S. at 474 (J. Harlan, concurring).

The views expressed by Mr. Justice Harlan are akin to the views of this court in *Byrd v. Blue Ridge Electric Cooperative, Inc.*, 356 U.S. 525 (1958), decided before *Hanna*. In *Byrd*, the Court referred to the "likelihood of a different result" as controlling the issue. The case at bar clearly fits within the framework of a different result. Had the Court of Appeals reviewed this case under the standard of review of the Florida courts, a different result would be likely since the explicit deference to the District Court in accord with Rule 52(a) would not be required.

This Court has not heretofore spoken on the application of the *Erie* doctrine to the standard of review by the Courts of Appeal. The uncertainty which surrounds the interplay between the Federal Rules of Civil Procedure and state substantive law in light of *Erie*, *Guaranty Trust*, *Byrd* and *Hanna*, as well as the differing approaches outlined by Chief Justice Warren's majority opinion and Mr. Justice Harlan's concurring opinion in *Hanna*, has received much deserved attention. *See, e.g.*, Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction Sec. 4501-4511 (1982). *See also* Kurland, *Mr. Justice Frankfurter, the Supreme Court and*

the Erie Doctrine in Diversity Cases, 67 Yale L.J. 187 (1957); Note, *Unclear State Law in the Federal Courts: Appellate Deference or Review?*, 48 Minn. L. Rev. 747 (1964). This case presents an opportunity to review *Hanna v. Plummer* and to resolve such uncertainty. That majority decision adopted an expanded application of federalism and seriously narrowed those profound aspects of *Erie* and *Guaranty Trust* that recognized the importance of application of state law in federal diversity cases.

Petitioner is not suggesting that *Hanna* be overruled. He is suggesting that it be confined to its unique factual issues[8]/ and that the concurring opinion of Mr. Justice Harlan be adopted.

2. This Court should grant review to determine the scope of privilege where the party claiming it calls the other person privy to the privileged information as a witness. This question has received scant attention at the appellate level. The Court of Appeals did not choose to address it. Nonetheless, it is an important fundamental issue at trial. Several trial courts have addressed the question and the Court of Appeals in other cases. However, in this case the court below simply ignored its own precedents.

Respondents defensively shielded information sought by Petitioner from the patent attorney, Charles Wands, while offensively eliciting carefully chosen testimony to their own benefit. Thereby, Stuart was unable to conduct a full and effective cross-examination of this witness and Wands' one-sided testimony should have been stricken.

"The [attorney-client] privilege . . . was intended as a shield, not a sword." *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 446 (S.D. Fla. 1980); *F.D.I.C. v. Cherry, Bekaert & Holland*, 131 F.R.D. 596, 600 n.5 (M.D. Fla. 1990). "[T]he privilege of secret communication is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." *Hyde Construction Company v. Koehring Company*, 455 F.2d 337, 343 (5th Cir. 1972) (citation omitted).[9]/

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[8]/*Hanna* was decided in a pre-trial posture.

[9]/*See also GAB Business Services, Inc. v. Syndicate*, 809 F.2d 755, 762 (11th Cir. 1987) (a party cannot base a claim on matters which would be privileged, the proof of which will necessitate the introduction of a privileged matter into evidence, and then attempt to raise the privilege to thwart discovery); *Com-*

Furthermore, "the failure of a party to allow pre-trial discovery of confidential matter which that party tends to introduce at trial will preclude introduction of that evidence." *International Telephone and Telegraph Corp. v. United Telephone Company Florida*, 60 F.R.D. 177, 184 (M.D. Fla. 1973) (subsequent history omitted).

Respondents, by withholding requested information only to elicit selective portions of it at trial, prejudiced Petitioner's ability to conduct a full and thorough cross-examination of Wands. Accordingly, Wands' testimony should not have been allowed into evidence given its piecemeal substance and incompleteness, and given Respondents' procedural impropriety employed during both discovery and trial. The admitted testimony is tantamount to surprise, by which Stuart was unfairly and substantially prejudiced in contravention of Fed. R. Evid. 403.

3. An element of fundamental judicial fairness is also at issue. The trial court excluded from evidence the file histories of the patents for PRS because they did not appear on Plaintiff's [Petitioner's] pre-trial exhibit list. This documentary information regarding the two PRS patents was requested from Respondents prior to trial, but was never turned over. (R 21-pp. 176-177) Thereafter, Respondents proceeded to put Wands on the stand to elicit self-serving testimony, leaving Stuart faced not only faced with unjustifiable claims of privilege, but without documents from Respondents upon which effective cross-examination could be based.[10/] Judicial equities weighed greatly in favor of admitting the patent documents, Plaintiff's [Petitioner's] Tendered Exs. 34 and 35, despite a technicality regarding exhibit lists. Indeed, the primary purpose for which exhibit lists are intended—to prevent surprise at trial—is soundly unavailable to Respondents in arguing against admissibility.

Such substantial prejudice has resulted here, for Plaintiff's [Petitioner's] Tendered Exs. 34 and 35, significantly, do not show Dr. Thomas as an accredited inventor of PRS, although Winter

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puter Network Corp. v. Spohler, 95 F.R.D. 500, 502 (D.D.C. 1982) (a party cannot convert the attorney-client privilege into a tool for selective disclosure); *Home Ins. Co. v. Advance Machine Co.*, 443 So. 2d 165, 168 (Fla. Dist. Ct. App. 1983) (selective disclosure as a means of defense also serves to waive privilege).

[10/]Counsel for Petitioner had to obtain copies of the patent files on its own, immediately before trial. (*See* R 21-209)

claims (and the District Court held) that PRS was Dr. Thomas' concept. (*See* Opinion, App. A4; R 11-293, pp. 11-12, 23). Furthermore, the similarity in language between the patent files and Stuart's article (Pl. Ex. 8) belie any contention that Stuart was not a contributor to PRS. The District Court erred in excluding Plaintiff's [Petitioner's] Tendered Exs. 34 and 35, and its ruling should be reversed on this point of important documentary evidence. Even federal statutes provide for the admissibility of Patent Office records. *See* 28 U.S.C. Sections 1744, 1745 (1964).

In this instance, substantive evidence regarding the two patent applications was brought into the record *by Respondents*, who opened the door on this matter by calling Wands to the stand. Thereby, the circumstances regarding preparation of the documents, the included information and the sources of the information all should have become evidence ripe for consideration. Obviously, the very patent files themselves are highly competent evidence and indeed would be needed to achieve a complete record regarding Wand's testimony. By raising this matter, Respondents impliedly consented to the introduction of such evidence, and a technicality regarding omission from an exhibit list should not have worked to cause substantial prejudice to Petitioner at trial.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner prays that this Court issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]
FILED OCT 20 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3608

D. C. Docket No. 89-640-Civ-Orl-18

ROBERT O. STUART,

Plaintiff-Counterclaim
Defendant-Appellant,

versus

WALTER WINTER;
GOLDEN ENTERPRISES, INC;
GOLDEN ENTERPRISES INTERNATIONAL, INC.;
WINTER (WALTER W.) INVESTMENTS, INC.,

Defendants-Counterclaim-
Plaintiffs-Third-Party
Plaintiffs-Appellees,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Third-Party Defendant.

Appeal from the United States District Court
For the Middle District of Florida

(October 20, 1992)

Before TJOFLAT, Chief Judge, FAY, and COX, Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxed against appellant."

Judgment Entered: October 20, 1992
For the Court: Miguel J. Cortez, Clerk
By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: DEC 02 1992

FILED OCT 21 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3608

ROBERT O. STUART,

Plaintiff-Counter-claim-
Defendant-Appellant,

versus

WALTER WINTER; GOLDEN ENTERPRISES, INC.; GOLDEN ENTERPRISES INTERNATIONAL, INC.; WINTER (WALTER W.) INVESTMENTS, INC.,

Defendants-Counter-claim-
Plaintiffs-Third-Party-
Plaintiffs-Appellees,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Third-Party Defendant.

On Appeal from the United States District Court for the Middle District of Florida

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O R D E R:

Appellant's motion for re-argument of the appeal and to file supplemental briefs in DENIED.

/s/ PETER T. FAY
UNITED STATES CIRCUIT JUDGE

FILED 91 JUL-8

United States District Court

MIDDLE DISTRICT OF FLORIDA

Robert O. Stuart **JUDGMENT IN A CIVIL CASE**

v.

Walter Winter and Golden Enterprises, Inc.,
Golden Enterprises International, Inc. and
Winter (Walter W) Investments, Inc.

v. CASE NUMBER: 89-640-CIV-ORL-18

American Telephone and Telegraph

☐ **Jury Verdict**. This action came before the Court for a trial by jury. This issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Walter Winter and/or Golden Enterprises, Inc. never entered into, created or formed a partnership agreement, or agreed to create, form or enter into a partnership or agreement with Robert O. Stuart in June 1983, or at any other time, for the creation, manufacture, production, development, patenting or marketing of Personalized Response System (PRS) or any other purpose. It is further **ORDERED AND ADJUDGED** that PRS was not the concept, design or product of Robert O. Stuart or passed along by Robert O. Stuart to Walter Winter, Golden Enterprises, Inc. or anyone else.

It is further **ORDERED AND ADJUDGED** that Robert O. Stuart is not entitled to the relief sought, and that the temporary injunction heretofore entered herein to preserve the assets of Golden Enterprises, Inc., pending decision on the issue of whether a partnership was formed and existed, is hereby dissolved and that defendants recover their costs herein.

July 8, 1991 DAVID L. EDWARDS

Date *Clerk*

/s/ Richard B. Kellam /s/ Marti Campbell

(By) Deputy Clerk

c: counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROBERT O. STUART,

Plaintiff,

v. Case No. 89-640-CIV-ORL-18

WALTER WINTER and
GOLDEN ENTERPRISES, INC.,
GOLDEN ENTERPRISE INTERNATIONAL
INC. and WINTER (WALTER W.)
INVESTMENTS, INC.,

Defendants,

v.

AMERICAN TELEPHONE AND
TELEGRAPH,

Third Party Defendants.

OPINION AND ORDER

Asserting that he entered into an oral partnership agreement with Walter Winter (Winter) in Indianapolis, Indiana on June 13, 1983, to become a silent partner to design, patent, develop, manufacture and market a product known as Personalized-Response System (PRS), Robert O. Stuart filed this action in equity for an accounting, imposition of a constructive trust, dissolution and distribution of the assets of the partnership.

This action was commenced by Stuart against Winter and Golden Enterprises, Inc. (Golden). Thereafter an amended complaint was filed naming Golden Enterprises International, Inc. and Winter (Walter W.) Investments, Inc. as additional defendants. Defendants' responses to each of the complaints have been the same, i.e., a denial of any partnership or agreement for a partnership, or any right or claim of Stuart, and in addition in the response to the amended complaint, defendants raised the affirmative defense of the Statute of Frauds and filed a counterclaim. Plaintiff says that a failure of defendants to raise the question of the Statute of Frauds in the response to the original complaint constitutes a waiver and that the question may

not be raised to the amended complaint even though it added additional parties. In any event, the facts and circumstances demonstrate plaintiff's position on this issue is without merit.

Pursuant to stipulation approved by the Court on May 2, 1990, the action was bifurcated for discovery and trial of the issue of whether there was in fact a partnership between the parties; the issue of the Statute of Frauds; and the remedy to be imposed if there was a finding that a partnership had been created.

The first issue before the Court is whether this action is barred by the Statute of Frauds, and the second, whether Stuart and Winter entered into a valid partnership in June 1983, for the development and marketing of the PRS system.

At the conclusion of plaintiff's case and again at the conclusion of the presentation of all of the evidence, defendants moved the Court to dismiss plaintiff's claim and enter judgment for the defendants. The grounds of such motions were the assertions plaintiff had failed to state a claim upon which relief could be granted; the evidence failed to state a legitimate claim; the claim was void under the Statute of Frauds because not in writing; there was no basis for a claim against either Golden Enterprises or Winter; that no partnership had been established; and plaintiff was not otherwise entitled to relief. The Court withheld ruling on each of these motions.

I.

Jurisdiction of this action is grounded in diversity of citizenship. Plaintiff is a resident of Indiana and defendants are residents of Florida.

In a diversity case, the conflicts of laws rules of the forum state are to be applied by the federal district court. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020 (1941); *International Insurance Co. v. Johns*, 874 F.2d 1447, 1458 (11th Cir. 1989).

Under Florida law, issues concerning the validity and interpretation of contracts are determined by the law of the place where the contract was made. *Goodman v. Olsen*, 305 So.2d 753 (Fla. 1974); *Walling v. Christian & Craft Grocery Company*, 41 Fla. 479, 27 So. 46 (Fla. 1899). A contract is made where the last act necessary to complete the contract is done. *Jemco, Inc. v. United Parcel Service*,

Inc., 400 So.2d 499 (Fla. 3d DCA 1981). In determining the validity of a contract, the statute of frauds of the place of making is applicable. *Castorri v. Milbrand*, 118 So.2d 563 (Fla. 2d DCA 1960).

Questions of evidence, competency, admissibility, quality and degree of evidence are governed by the law of the forum. Florida Jur 2d, Conflicts of Laws, § 50. In order to recover on a claim of breach of contract, the claimant has the burden to prove by a preponderance of the evidence the existence of a contract, and breach of that contract resulting in damages. *Knowles v. C.I.T. Corporation*, 346 So.2d 1042 (Fla. 1st DCA 1977). The contract must be proved by competent evidence. *Rood v. Miami Air Conditioning Co.*, 193 So.2d 216 (Fla. 3d DCA 1966).

A.

In this case, to answer the question whether a partnership existed, the parties look to the Uniform Partnership Act (the Act) adopted by both Indiana and Florida. The act defines "partnership" as "an association of two or more persons to carry on as co-owners a business for profit." Burns Ind. Code Ann. § 23-4-1-6; Fla. Stat. § 620.585. Under the Act, "association" connotes a requirement for a voluntary meeting of the minds to form a partnership. The test is whether the partnership exists within the partner's intent. The Act also sets forth rules for determining the existence of a partnership.[1] None of those rules, however, apply to the facts of this case. Thus, the Court must make recourse to the common law

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[1]Burns Ind. Stat. Ann. § 23-4-1-7 and Fla. Stat. § 620.59 provide:

In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by section 16 of this chapter, persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment [of a debt, as wages, as an annuity, as interest, or as consideration for the sale of goodwill of a business].

of the states to determine whether in fact a partnership existed between the parties here.

Under the Indiana cases, essential to the formation of a partnership is a contract, either express or implied. *J.M. Schultz Seed Co. v. Robertson*, 451 N.E.2d 62, 65 (Ind. App. 1 Dist. 1983). Since the partnership can commence only by the voluntary contract of the partners, generally, the question of partnership existence is one of fact. *Id.* at 64. While under the Act receipt of profits is *prima facie* evidence of partnership, mere tenencies in common or joint tenancies in property do not by themselves, establish a partnership. Nor does the sharing of gross income. *Id.* Lack of daily involvement for one partner is not per se indicative of the absence of partnership. *Vohland v. Sweet*, 433 N.E.2d 860, 864 (Ind. App. 1 Dist. 1982). A partnership may be formed by the furnishing of skill and labor by others. The contribution of labor and skill by one of the partners may be as great a contribution to the common enterprise as property or money. *Id.* Ultimately, to establish the partnership relation between the parties there must be:

> (1) a voluntary contract of association for the purpose of sharing the profits and losses, as such, which may arise from the use of capital, labor or skill in a common enterprise; and (2) an intention on the part of the principals to form a partnership for that purpose. But it must be borne in mind, however, that the intent, the existence of which is deemed essential, is an intent to do those things which constitute a partnership. . . .
>
> It is the substance, and not the name of the arrangement between them, which determines their legal relation toward each other, and if, from a consideration of all the facts and circumstances, it appears that the parties intended, between themselves, that there should be a community of interest of both the property and profits of a common business or venture, the law treats it as their intention to become partners, in the absence of other controlling facts.

Id. at 864, quoting *Bacon v. Christian*, 184 Ind. 517, 521-522 111 N.E. 628 (1916).

In Florida also, an express or implied contract between the parties is essential to the formation of a partnership. *Matter of*

Ward, 6 B.R. 93, 94 (Bkrtcy.M.D.Fla. 1980). The contract is a voluntary agreement to "place [the parties'] money, effects, labor and/or skill in lawful commerce or business, with the understanding that there shall be a communion of profits between them. *Florida Tomato Packers, Inc. v. Wilson*, 296 So.2d 536 (Fla. 3d DCA 1974). In determining whether an actual partnership relationship exists, the primary test is whether there was an intention of the parties to be partners. 6 B.R. at 94. Other factors to consider are what contribution each of the parties make to the capital of the business and whether the agreement is to share in the profits and losses, and the assets and liabilities of the business. *Id.* at 95. No one factor is determinative, and the court must consider the totality of all relevant facts and circumstances. *Id.* The existence of a partnership is a question of fact to be determined from the conflicting testimony or the testimony from which different inferences may be drawn, and it is within the province of the judge, sitting as the trier of the facts, to decide whether those facts exist that show that a partnership has been formed. *Perez v. Hernandez*, 323 So.2d 4 (Fla. 3d DCA 1975). The practice of the Florida courts is, like Indiana courts, to look beyond the label of the relationship to the substance of the arrangement between the parties, to determine whether they were, in fact, partners. See *Conklin v. Pruitt*, 182 So.2d 644 (Fla. 1st DCA 1966).

B.

Winter has raised the statute of frauds in defense of this action.[2] Under Indiana law, to fall within the statute, the agreement must be one of which it can truly be said at the very moment the agreement is made that there cannot be the slightest possibility that it can be fully performed within one year. *Ryan v. Upchurch*, 474 F.Supp. 211, 214 at footnote 1 (S.D. Ind. 1979) reversed on other grounds *Ryan v. J.C. Penney Co., Inc.*, 627 F.2d 836 (7th Cir. 1980). Thus, the general rule is:

> Where no time is fixed for the performance of a contract; or where it is to be performed by a certain day (the right to perform it sooner not being precluded); or where the performance

[2]Burns Ind. Code Ann. § 32-2-1-1; Fla. Stat. § 725.01.

depends upon a contingency which may or may not happen within a year, the contract is not within § 1 of the statute of frauds.

Wright Mfg. Corp. v. Scott, 172 Ind. App. 154, 360 N.E.2d 2, 10 (Ind. App. 1 Dist. 1977). The Indiana cases agree with the majority of jurisdictions. See 72 Am Jur 2d *Statute of Frauds*, § 31; 37 C.J.S., *Frauds, Statute of*, § 66. Thus, an agreement entering *into a partnership* that may be performed within a year is not within the statute of frauds. *Id.*

The Florida courts have applied the statute of frauds more stringently than Indiana courts. In Florida, the statute is to be strictly construed in order to intercept the frequency and success of actions based on loose verbal statements and mere innuendos, and courts should be reluctant to take cases from its protection. *Yates v. Ball*, 132 Fla. 132, 138, 181 So. 341, 344 (Fla. 1937). As applied by Florida courts, the general rule is that when no definite time is fixed by the parties for the performance of their agreement, and there in nothing in the terms of the agreement to show it could not be performed within a year according to the intent of the parties, it should not be construed as being within the statute of frauds. *Id.* at 139, 344. But when no time is agreed on for complete performance of the contract, and from the object to be accomplished by it and the surrounding circumstances, it is clear the parties intended the performance should extend for more than a year, it is within the statute. This is true even if, unlike Indiana, there is a possibility the performance may be completed in a year. *Id.* Thus, an oral agreement to enter into a new business which will continue indefinitely, where there is nothing inherent in the agreement to limit its operation to a period of one year, is within the purview of the statute. *Weinsier v. Soffer*, 358 So.2d 61, 63 (Fla. 3d DCA), cert. denied, 365 So.2d 714 (Fla. 1978). To determine whether the statute of frauds bars enforcement of an oral contract on the ground that it is not to be performed within one year, the court must look to the intent of the parties as evidenced by the entire record. *Khawly v. Reboul*, 488 So.2d 856, 858 (Fla. 3d DCA 1986).

It would seem to make little difference on the issue of the Statute of Frauds whether we apply the law of Indiana or Florida to the facts of this case. Among the questions to be considered is whether the parties, or either of them, ever contemplated it was possible for

the contract to have been performed in a year. This and the other questions will turn upon the facts of the case.

II.

From 1962 until the end of 1983, plaintiff was an employee of Indiana Bell Telephone Company in Indianapolis, Indiana (Indiana Bell). Pursuant to the divestiture and plan of reorganization of AT&T, provided for in the action of *United States v. Western Electric Co., Inc., et al.*, 569 F.Supp. 1057 (D.D.C. 1983), the Bell System was divided between AT&T and the operating telephone companies. Operator service equipment and employees for the directory assistance within the operating telephone company's service areas were assigned to those companies called Regional Bell Operator Companies (RBOC). Since that time, Indiana Bell, which became a part of RBOC, has been prohibited from engaging in manufacturing or producing telephone equipment. In June 1983, Stuart knew that on January 1, 1984, he would change his employment from Indiana Bell to AT&T. He had more than 20 years of experience in managing telephone company operator services.

Defendant Walter Winter was an engineer with knowledge and experience in devices and programs for training telephone operators. Since about 1970, he has been engaged in the design, production and marketing of telephone products for the education, training and assistance of telephone operators and in the improvement of their level of customer service. He was one of the founders and a principal stockholder of Golden Enterprises. Since the late 70's and early 80's, Winter's (or Golden Enterprises') customers included Indiana Bell and AT&T to whom he marketed operator training and assistance devices and programs. Through these efforts and contacts with Indiana Bell, he became acquainted with plaintiff Stuart, who, because of his position, was a valuable contact for Winter and Golden Enterprises with Indiana Bell and AT&T.

A.

Winter and Stuart became acquainted sometime about January 1983 on a visit by Winter to Indiana Bell in Indianapolis where he was seeking to sell telephone operator training equipment.

From the late seventies and early eighties, and prior to the time that Stuart met Winter, Winter had been manufacturing, deal-

ing in and selling equipment, services, programs and training materials to AT&T and its subsidiaries. He and his company had developed time and energy savers and programs for AT&T and its subsidiaries, and he and his company were constantly working on such items. The telephone companies conducted numerous surveys to determine ways and means of improving their services and keeping satisfied customers, and testing of new equipment and means. Operator courtesy was a prime subject. The operator's tone of voice and greeting responding to an inquiry or a call was of great importance. It was easily apparent that an operator responding to some 800 to 1000 calls a day would grow weary and at times irritable. An unpleasant encounter with a customer might and would affect the operator's response to the next customer. The telephone companies and others were constantly searching for ways to assist with this problem. The idea or conception of what Winter named the Personal Response System (PRS) was an ingenious solution.

B.

There is dispute as to who originated the concept of the unit or item now named PRS. Dr. Kathleen Thomas, while working for Golden in 1982-83 says she discovered the concept. Winter testified that the concept was that of Dr. Kathleen Thomas who was employed in June 1982 to work with Golden as a consultant. Among her duties was to review the Improved Telephone Communication Program of Golden's and file a report.

A copy of the minutes of the Board of Director's meeting of Golden (Director's meeting) of June 1982, sets forth the fact of her employment and assignment. Minutes of the Director's meeting of June 1, 1983, set forth that Dr. Thomas recommended that Golden

> . . . develop a product that would alleviate the boredom of using an Answering Phrase a thousand times a day. This would assist the operator in answering each call in a voice that would serve as a role model for each call.

Winter and Dr. Thomas then gave the article the name of Personalized Response System (PRS). At the Director's meeting of June 30, 1984, the minutes show that "reports were made on the Personal-

ized Response System (PRS) program." These minutes further set forth that

> A patent was filed for prior to presenting the PRS to AT&T.
>
> Presentations are planned for all Bell Operating Companies with respect to the PRS.

Stuart asserts that he originated the concept of PRS and that he had numerous discussions with Winter about an electronic automated telephone operator greeting or announcement at the beginning of a telephone call and that his idea was that it would save the telephone company a considerable amount of money; that he had a number of conversations with Winter concerning the idea; that in April 1983 (the actual date was after June), he provided Winter with tapes which his son, Dr. Robert Stuart, II, had developed from tape recordings of hundreds of operator responses for directory assistance calls, which he asserts demonstrated that the time lag between the zip tone and the operator's response was 1.5 seconds; that a compact digital operational response system or device, or a mechanized voice response system could be developed to eliminate the 1.5 seconds or portion thereof; and that such a device would result in substantial money savings for the telephone company.

Stuart further asserts that beginning in December 1982, through May of 1983, he and his son made tests from telephone calls to determine the time span between the zip tone and the operator's response. He determined it to be between one second to one and one half seconds. The saving of this time, so he asserted, would translate into a substantial sum of money and savings for the telephone company. He further asserts that he then studied means of how to save this time lag. He says he had in mind some mechanical or electrical response following which the operator would then respond on the line and handle the call. According to some of the employees of AT&T and Indiana Bell, there had been discussions for a long time of the need for such a product. Stuart testified that sometime in the springtime or April 1983, he forwarded to Winter tapes which his son had made of the time lag between zip tone and

the operator's response.[3] They were not actually mailed until July. The letter forwarding the tapes is defendant's Exhibit 5, and is dated July 21, 1983. While Stuart testified that by June, Winter had completed his study of the tapes, the facts establish he had not then even received the tapes. In Winter's letter to Stuart dated September 16, 1983, (Def. Ex. 6), he commences, "[W]e are continuing our efforts to analyze the tapes that you forwarded to us and to establish benchmarks for the Directory Assistance and TSPC Centers." He continues by saying they expected to complete the analysis by September 26th. Too, in the September 16 letter to Stuart he expressed thanks "for the opportunity to work along with you and your staff in a common endeavor to achieve system leadership in TELSAM results." At trial, Winter testified the tapes were sent to him for use in trying to improve the TELSAM reports.

In a letter of October 13, 1983, Dr. Thomas wrote Stuart they were looking forward to his coming visit.[4] Therein she reported some observations that had become apparent from the tape and the TELSAM reports.

III.

Contending that the PRS was his conception, Stuart said that in the May and June 1983 time frame he had numerous discussions with Winter about developing the PRS and that the conception and idea grew out of the tapes which his son made and which he sent; that pursuant to these discussions, on June 13th, 1983[5], in a meeting between Stuart and Winter in Indianapolis, they agreed to be-

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[3]In his testimony at trial, Stuart said the tapes were mailed to Winter in April 1983. In his discovery depositions, he said they were mailed in the summer of 1983. It makes little difference when the tapes were mailed, for they are not the concept of PRS, and only demonstrate the need, a fact which was well known and discussed in the industry. *See* depo. of Nancy Saltsgiver p. 12-28-29. Mechanization of operator response had been an ongoing evolving interest since 1959. *See* depo. Bevoy p. 95 & 139.

[4]In Winter's July 8 letter to Stuart, he told him Golden was sponsoring a TELSAM meeting near Disney and invited him to come down. In Winter's September 16 letter, he said they had extended the TELSAM meeting to October 31 and invited him to come.

[5]Though Stuart first said the agreement was reached June 13, 1983, when it became apparent Winter was not in Indianapolis on June 13th, he changed the date to June 20th.

come partners for the design, development, patenting and marketing of such a device for use by telephone companies; that they agreed Winter would perform the design work and obtain a patent in the name of Golden Enterprises, and Stuart, who was to be a silent partner, would provide the technical parameter needed to make the device compatible and provide the marketing assistance.

Stuart's idea of the PRS's benefit and value was its supposed time saved between time of the zip tone and the operator's response, which he asserts was one and a half (1-1/2) seconds, which he converted into dollars and cents as a savings to the telephone company.

Stuart testified that in June 1983 when Winter was in Indiana in Stuart's office, he had a discussion with Winter about the PRS concept; that they went to the office of Joyce Drabing, and then to another room; that while in the other room he asked Winter if they could be partners; that Winter agreed and they shook hands; that they went back to Joyce Drabing's office and shook hands again and Stuart said we are going to be partners; that Winter was to immediately commence a patent search; that he considered Winter and Golden Enterprises as one and the same; that he was to be a silent partner; that as late as December 1983, the product did not have a name and in December 1983, Winter suggested the name PRS for Personalized Response System to which he agreed; and that during early 1984 he had numerous discussions with Winter about commencing work on the unit which he called a box, and they discussed its size; that in April 1984, while on vacation in Florida, he went to Winter's headquarters; that Winter told him he would commence filing of application for a patent; that at that time Winter offered him shares of stock in Golden Enterprises, but the timing was not right for him to accept shares of stock in Golden as he was still to be a silent partner; and he refused it because he was an AT&T employee. However, he said that in his mind, he was a part owner of Golden Enterprises. He testified that he put on a demonstrations of the unit to AT&T in May 1984, but the evidence establishes this demonstration was conducted by Ms. Erwin. He further said he assisted in others; that in the August 1986 time frame he did request stock in Golden Enterprises; and that not until 1988, when he received the letter of July 1988 (he referred to it as August 8, 1988), did he feel Winter was reneging on the partner-

ship. Stuart further asserted that in 1986 he discussed moving to Florida and becoming a viable partner.

Stuart offered as evidence of his partnership, the testimony of several parties who asserted they heard Stuart or Winter refer to themselves as partners, as well as the testimony of a member of his staff, Joyce Ann Drabing. She testified that Stuart brought Winter into her office and introduced him to her; and that she heard Winter and Stuart talking about training tapes while in her office; that they left her office, walked into another room and then returned; that she heard Stuart say its my invention; I've done my own research; that Stuart asked Walter if he could patent it and Walter said he could do it; that Stuart said we are partners, they shook hands and left. She also testified that most of Stuart's staff worked on the PRS project; and that at that time she and Stuart knew they were going with AT&T.

On the contrary, Winter (and Golden) asserts he never entered into or agreed to enter a partnership or joint venture or agreement with Stuart, nor agreed Stuart was entitled to or could receive or obtain any interest in Golden, or that Stuart originated or suggested the concept of PRS. Defendants, through Winter and others, assert that the concept, idea and theory of PRS was that of Dr. Kathleen Thomas who presented the concept at a meeting of the Board of Directors of Golden on June 1st, 1983 and that it was Winter and Golden who thereafter developed, designed, patented and brought into reality PRS.

Winter, and others connected with Golden, testified Stuart had nothing to do with the concept, idea or development of PRS; that no idea or information relative to the concept and development of PRS was suggested or furnished by Stuart; that the concept and development was solely through Winter and Golden; that the patent search was directed by Winter; that Winter, Steve Gothard and John Drew, all stockholders in Golden, were listed as the persons who discovered and brought about PRS; that they, along with another employee of Golden worked on bringing about PRS; and that the patent was assigned to Golden.

Winter further testified that Stuart did suggest to him he would like to obtain some stock in Golden and had expressed a desire to own 50% of Golden; that he reported this to the Board of Directors at its meeting on June 30, 1984, as shown thusly by his report in the minutes:

Mr. R. Stuart expressed his desire to own 50% of Golden Enterprises, Inc. stock. Shareholders were notified of his request and shareholders expressed no interest in his request.

Again, in the minutes of June 14, 1984, is a report by Winter concerning Stuart's trying to pressure Golden for stock and employment, and he was getting to be a real nuisance.

Winter said he realized that Stuart could be of assistance to Golden in marketing its program and items, including PRS because of Stuart's position with Indiana Bell and AT&T; that he was a valuable contact and he tried to stay on the good side of Stuart; and that he considered him a customer and he tried to cultivate good will with him. Further, Stuart was an employee of AT&T, and Winter knew AT&T was interested in PRS and its development. A part of Stuart's duties at Indiana Bell and AT&T was improvement of service and raise the performance of operators. There was a constant search for ways and means to do so. Winter's business was that to provide ways and means to do this through training and new equipment. After Winter demonstrated the PRS, Indiana Bell and AT&T assigned persons from operations and some from Stuart's staff to work with Winter in developing and testing the article. These employees were on the payroll of Indiana Bell and AT&T, and among them was Ms. Cheri Erwin. She was asked by Stuart to work with Winter and Dr. Thomas, seeking their assistance and means to improve the performance of the operators because that showed how their company was progressing. Erwin made two trips, at AT&T's expense, too Melbourne to confer with Winter on the programs. At the Regional Manager's Conference in May 1984, she demonstrated the PRS. AT&T also paid for certain of the equipment used in demonstrations.

In a letter from Winter to Ms. Erwin of May 21, 1984, Winter said that his observations indicated that customer-company perceptions were based primarily on the operator's courtesy, accuracy and productivity and the object was to help the operators improve efficiency and courtesy and become a truly professional communicator. Therein he suggested the use of PRS because it provided advantages to the customer, operator and management. Therein he set out the purpose, advantage and savings of PRS. On the same

date, Winter wrote Stuart setting forth the same observations he had set out in the letter to Ms. Erwin. He also set out in paragraph 2 of that letter (Def. Ex. 12):

> In view of these objectives, we have developed the Personalized Response System (PRS) which sets the tonal quality of the call and provides advantages for the customer, operator and management.

Winter then went into detail in explaining the operation and the advantages. If Stuart had been the creator of PRS, it would have been foolish for Winter to explain to him how the article worked.

The value and use of PRS as asserted by Stuart and Winter was entirely different. Stuart saw it as a time saving device, saving dollars and cents for the company. Winter, Dr. Thomas and Jo Morris saw and developed, marketed and promoted it to improve operator tone and service. As established by the evidence, this is what AT&T and the other contemplated users were seeking. From its beginning, Winter was seeking the interest and approval of AT&T for the concept. He realized that the approval of AT&T was of the greatest value. With this in mind, he sought its assistance in developing and marketing the product, and obtained substantial assistance from AT&T. It directed Ms. Erwin to furnish information to Winter. AT&T made arrangement for test trials at Basking Ridge on August 15, 1984. At that meeting, George Barrett of AT&T described the PRS and how it was used. He stated the "system is a product of Golden Enterprises of Melbourne, Florida, whose President is Walt Winter." Minutes of meeting of 8/15/84, Exhibit P-18. These minutes describe the system in detail. There were seven other AT&T employees there. These minutes state that it was the opinion of those present that a company trial should be conducted. A second meeting of the committee formed by AT&T to carry out PRS was held September 20, 1984 attended by some seventeen others of AT&T besides George Barrett. Other meetings were held October 16, 1984 and November 11, 1984. It is noted that Stuart was not present at three of these meetings. In a letter of October 1, 1984, Mr. Barrett outlined to Winter as President of Golden certain things AT&T would want if it ultimately determined PRS had real merit.

IV.

Conflict in, contradictions of and challenges to the evidence are numerous. Different interpretations and meanings are placed on the exhibits by the parties. Charges of tampering with written exhibits are made. There is little agreement on anything. Stuart did say, however, that the only partnership agreement was the one he says was formed in June 1983.

Stuart attempted to record a telephone call which he alleges he made to with Winter on or about July 30, 1986. There is serious challenge to the accuracy of this tape. What purported to be an exact copy of the original tape was produced to counsel for defendants. It was examined by an expert who testified it was not a valid tape. The attempted recording, care and handling of the tape is the subject of much dispute and concern. The original was allegedly stolen from counsel's hotel room during the trial and recorded.

Winter admits a conversation with Stuart, but says the tape and transcription therefrom are not authentic; that his voice is on the tape, but that the recording is not accurate; that a supposed response to questions is out of context; that is, that the tape has been manipulated, and responses to statements have been manipulated and shown as responses to different statements.

What is said and what is not said about the recording is rather strange. For instance, Stuart and his wife attempted once before to record a telephone call from Stuart to Winter, but the recorder did not work. After they allegedly recorded the conversation of July 30, 1986, there is no evidence they tested to see if it was recorded. Stuart said he had a copy of that tape made, but no one testified that the copy was then tested, nor did anyone testify that there was a recording on the original tape. Stuart said he sent the original tape to his counsel, and that they held the tape for sometime; that thereafter he picked up the original tape from his counsel, had another copy made and sent that copy to defendant's counsel. The copy they received was a manipulated copy.

The Court withheld ruling on the admissibility of the tape to give counsel an opportunity to deal with its admissibility in their briefs. Nothing said in the briefs deals with or is relative to its admissibility.

The Court has decided to admit the tape, giving such weight to it as the evidence establishes it should be given, which is very little.

V.

Here, the plaintiff has the burden of establishing that on or about June 20th, 1983, plaintiff entered into an oral valid partnership with Winter for the development, patenting, manufacture, display and marketing of a product hereafter called PRS.

The facts set out above, when reduced to concise language, consist of the assertions of plaintiff, Robert Stuart, that he met Winter in January of 1983; that except for telephone conversations with him, he did not see or talk with Winter again until June 20th, 1983; that he sent him some tapes of telephone operator responses in April 1983, which Stuart says was the background or basis for his concept of PRS; that in April 1983, after sending the tapes, he had telephone conversations with Winter and they then started talking about doing a deal together; that on June 20, 1983, when Winter was in Indianapolis on a visit to Indiana Telephone, Stuart and Winter entered into a partnership for the development and distribution of a product, later called PRS, which Stuart said would make millions of dollars for each of them. But the first problem with that contention is that the evidence establishes the tapes were not sent in April 1983, but were sent in July 1983, and did not deal with PRS, but with TELSAM. The second problem is that PRS was already a concept of Dr. Thomas who was working for Winter and Golden before Winter or Golden received the tapes. The third problem is that Winter never had any such discussion with Stuart about the concept, development or manufacture of an item, later known as PRS, prior to the date of June 1983, when Stuart says the agreement was made.

Stuart had held a responsible position for a great many years with Indiana Telephone and worked closely with AT&T. Winter had been in the business of developing programs and attachments for use by telephone companies for a number of years. Stuart's explanation of the manner and way in which he says the partnership came into being, and his explanation of comments between two business men calling and referring to each other as "partner", his testimony of their comments they were going to "make a lot of

money", they would "make millions", they would "own a football team", and they would enter a "car into the Indianapolis 500 the next year", and similar statements, do not ring true for two adult experienced business men. Stuart's contention he was to be a silent partner—so that neither Indiana Bell nor AT&T would know of his connection—is not compatible with his testimony of his alleged numerous references to the partnership, nor compatible with statements some of the employees of Indiana and AT&T that allegedly heard discusssions of the partnership, and heard Stuart say he was a partner with Winter. Contrasted with Stuart's statement that he declined Winter's offer of stock in Golden because he did not want AT&T to know he had any interest in PRS, it is difficult to understand how AT&T would learn about his stock ownership and not have learned from its employees of the alleged statement about the partnership.

Winter's assertion that Stuart does not come into court with clean hands is supported by the record. Stuart says he wanted to remain a silent or unknown partner because he did not want Indiana Bell or AT&T to lay claim to any interest he had in PRS; that he would wait until he retired and then become an active participant in PRS. When asked by his counsel whether the partnership had anything to do with his decision to leave Indiana Bell and go with AT&T, he replied:

> "A. It had all to do with it.
>
> Q. How?
>
> A. Because I wanted to remove any possibility of a conflict of interest with the RBOC's, Regional Bell Operating Company."
> (Tr. of Ev. 2/14 p. 264-265)[6]

Later when he wrote the letter, which is Exhibit D-10, to Winter dated April 19, 1984, he says he sent it about October 22-23-24, 1984, and back-dated it because he was concerned AT&T might

[6]Witness Drabing testified that in June 1983, she and Stuart were already lined up to go with AT&T (Tr. of Ev. 2/14 p. 44). Too, Stuart said he had no intelligence agreement with Indiana Bell, but did sign one with AT&T.

attempt to make a claim on PRS (Tr. of Ev. 2/15 p. 131). Apparently he thought this would be evidence he had no interest in PRS.

Stuart's contention they were partners and to share expenses and profits equally falls into another pit. Stuart said that the cost of obtaining a patent was between twenty-five and fifty thousand dollars, but there is no evidence he ever made any offer to advance a part of that cost, or that there was any discussion about it. It seems a bit unusual for a partner not to ask the other to contribute his share of such a charge. This becomes even of more concern since a second patent was applied for and obtained.

There is little doubt that Stuart expressed his approval of PRS and wanted it developed for the benefit of AT&T: It was a part of his official position with the telephone companies to improve the customer service. AT&T was indeed interested for it assigned employees to work with Winter on the project and appointed a committee to attend demonstrations to determine whether it would be of value to the company. Any assistance which Stuart gave in this regard was as an employee of Indiana and AT&T. Stuart probably saw that PRS had possibilities and no doubt would liked to have had some share in it, but the Court is fully satisfied from the weight of the evidence that neither Winter nor Golden entered into any partnership with Stuart in June of 1983, or at any other time. An appendix, which is made a part of this opinion is attached. Therein the Court has pointed out some of the conflicts in the testimony. The Court therefore finds that neither PRS nor its concept, as developed and patented by Winter and/or Golden, was in any way passed along by Stuart to Winter and that no partnership was ever created or agreed to, nor was a contract of partnership ever entered into between Stuart on the one hand and Winter or Golden on the other.

In view of the above finding, the Court need not reach the issue of the Statute of Frauds.

/s/ Richard B. Kellam
UNITED STATES DISTRICT JUDGE
Sitting by Designation

Date: June 5th, 1991

APPENDIX

1. Stuart testified in his deposition that the agreement of partnership was formed in the Indianapolis Office of Indiana Bell June 13, 1983. At trial, he testified it was June 20, 1983. His diary, or desk book, has a notation therein under date of June 13 and June 20th "Walt Winter". There is no question that Winter was not in Indianapolis or expected to be there on June 13th.

2. Stuart contends the partnership agreement was entered into after he had forwarded to Winter tapes which he made, but it is clear the tapes were mailed after the alleged date of the agreement and even by date of September 16 (Def. Ex. 6). Winter had not analyzed them.[1]

3. Stuart asserts he was the originator of the PRS concept. But, even if he was, he had not furnished the idea or the information to Winter prior to the time when Dr. Thomas passed the concept and idea to Winter in April or May of 1983. Winter had the idea and the concept prior to June 20th, 1983, and was working on it. The minutes of the Director's meeting of June 30, 1982, referred to the fact Dr. Thomas had entered the service of Golden and at the meeting of June 1, 1983 recommended they develop a product to alleviate the boredom of using an answering phase. The idea or concept of a mechanized operator's response had been ongoing for a number of years. The means of achieving it was the problem.

4. Stuart says that he was a silent partner, and could not be known because of possible conflict of interest. Yet, he says Ms. Drabing, a supervisory employee of Indiana Bell, was a witness to

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[1]Stuart asserted his son made tapes of the time lag between zip tone and the operator's response which formed the basis for the origin for the PRS concept and that he mailed the tapes to Winter in Spring of 1983, prior to the formation of the alleged partnership with Winter in June 1983; that Winter used the tapes to develop PRS and such use was the basis of their partnership. However it is clear the concept of PRS was reported by Winter prior to receipt of any tapes from Stuart. He further asserted he paid his son for the work and, as evidence of payment, offered in evidence Exhibits P-20, photo copies of some five checks signed by Mr. Stuart or his wife. Mrs. Stuart said that the checks payable to AFNB were for the work on the tapes and were deposited in their son's bank account. The checks are all dated 1983 and respectively, March 17, March 20, August 5, and two of them August 6th, for a total sum of $3,000.00. They show no endorsement as only the face of the checks is shown and except for one check there is no way of confirming what was done with the checks.

the partnership agreement. It could hardly have been a secret for Stuart told a number of people and a number of persons referred to having heard of a partnership.

(a) Richard Bevoy and Pamela Wright said that in May 1984 at a breakfast meeting at the Columbia Club, there was a general discussion of a partnership thing; and Bevoy said he heard it one day when he walked into Stuart's office and Stuart was talking on the telephone. Wright said they discussed they were in business together and were going to make a lot of money and that next year they were going to have a car in the Indianapolis 500 Race. The breakfast meeting was preparation for an upcoming regional manager's conference of AT&T.

NOTE: Jo Morris and Winter denied any such conversation took place. It is rather strange that Bevoy and witness Wright said there was open discussion about the partnership, but Stuart testified that after they finished the meeting about the upcoming Regional Conference, Winter asked Morris to excuse herself and he and Winter then talked about the partnership and that Winter said Morris was only an employee and didn't need to be present or know about the partnership.

(b) Nancy Saltsgiver testified Stuart said he talked to a Gilmore with CCI about developing his idea or concept before he talked to Winter, but Gilmore was not interested. He also told her he and Winter were partners.

(c) Several people said they heard Stuart say he and Winter were partners and some said they heard Stuart and Winter refer to themselves as partners, and say things like we are going to make a lot of money; we should make enough off of this to own a football team; we ought to make a lot of money out of this; they would be rich.

NOTE: This does not sound like businessmen with more than 28 years of experience, and one who would want his connections kept secret.

5. Though he said numerous people knew he and Winter were partners, he said that when Winter offered him stock in Golden, he refused. First he said the time was not right, and second in April 1984, he refused because he was an employee of AT&T and there would be a possible conflict.

6. Though he said he developed the concept of PRS while at Indiana Bell, he back dated the letter, Exhibit D-10, to Winter writ-

ten and mailed October 22-23-24, 1984 to April 19, 1984, because he was concerned AT&T might try to assert a claim to any interest he might have in PRS.

7. Stuart said that not until he received Winter's letter of August 8th, 1988 (must be referring to letter of July 27, 1988, Ex. p-18), did he feel Winter was reneging on the partnership agreement. Yet, Stuart asked Alden McLellan, IV to listen in on eight-ten-or a dozen telephone conversations or calls which Stuart made to Winter in 1984 and 1985 without letting Winter know he was listening, and Stuart requested he make note of one of the conversations as evidence of a partnership, but not to say anything on the line.

(a) Stuart told McLellan he was going to tape one of his telephone conversations with Winter without Winter knowing it.

(b) Stuart and his wife listen in on a telephone conversation he had with Winter so she could be a witness and then attempted to record it, but the tape did not record.

8. After the first try and failure to tape record a telephone conversation, on or about July 30, 1986, an attempt was again made to tape record a conversation. This tape was offered in evidence and is the subject of dispute as to whether the tape is a true recording or has been tampered with. There was no question in the mind of expert witness Dr. Bernard Krouse that the tape was not authentic, neither the alleged original or the copy.

One thing must be noted about the tape. Stuart and his wife had earlier attempted to tape record a conversation with Winter, but the tape did not record. After attempting the second time to record a conversation—which is the tape in question—there is no evidence the Stuarts tried to replay the tape or even tested to see if the conversation had been recorded. Instead the tape was removed and stored.

9. In Winter's letter to Stuart of May 21, 1984, as to Winter's ability to provide for the needs of the telephone company, he set forth the objectives of the telephone company and continued saying "In view of these objectives, we have developed the Personalized Response System (PRS) which sets the tonal quality of the call and provides advantages to the customer, operator and management." He continued with a full explanation of what the system did and how it worked.

Such hardly sounds like a letter written by one partner to another, particularly if the other partner was in fact the creator of the concept and idea.

10. Though Stuart says that his trip to Melbourne in 1984 was at the behest of Winter to discuss partnership matters, his letter of April 19, 1984 (Def. Ex. 10) shows otherwise. In that letter, Stuart wrote "[T]he demonstration of your digital speech retrieval device in Melbourne was very interesting. It was worth a day of my vacation." He continued by saying that the Regional Manager's Conference in Indianapolis in May would be a good opportunity to show the device. He also points out he might be able to participate in a limited way. He says this letter was back dated because he "was concerned AT&T might attempt to make a claim to PRS. (Tr. of Ev. 2/15, p. 131). Later, he said a Vice President of AT&T told him to back date the letter.

11. Under date of August 6, 1986, in a letter from Stuart to Winter, he recited, among other things:

> (a) Your offer of being on the Board of Directors sounds exciting as well as the partnership offer. We need to formalize a written agreement to protect both of us, our families. . . . future ideas that are still an embryo in my mind.
>
> (b) Another concern we have is communicating to Golden Enterprises, your majority stockholders, family members and your patent attorney our future plans as partners.
>
> (c) After discussions with my financial advisors, I do plan to set up a new corporation in September. [It] will be the depository of future inventions that exist in the seminal stage.
>
> (d) . . . My financial advisors at my suggestion have prepared a range of options for our consideration.
>
> (e) My attorney has submitted a preliminary agreement. . . . The stock exchange between the new corporation and Golden Enterprises will be handled as we deem fair.
>
> NOTE: Stuart's reference to offer of being on Board of Directors and partnership offer as sounding exciting—his intention to form another corporation and range of options hardly suggests that there is already a viable partnership.

12. The notation in the Director's meeting of June 30, 1984 sets forth that Stuart had expressed his desire to own 50% of Golden stock; the reference in the meeting of June 1, 1985 sets forth that Stuart was continuously asking to be associated with Golden; and the reference in the meeting of June 14, 1986 that Stuart was pressuring Golden for stock and employment, and would like 50% of the stock, are hardly indicative of the existence of an existing partnership.

13. In January 1984, at a dinner at the Skyline Club with Winter, Dr. Thomas, Stuart and Erwin. The purpose of the meeting was to discuss PRS and TELSAM. They were trying to find ways to assist operators and improve their image with customers—consulting Winter and Thomas on what kind of training programs would help improve the situation. Winter was offering their assistance in identifying problems and solutions. They discussed they already had TSPS. Stuart instructed Erwin to work with Winter and Dr. Thomas on the PRS project. Stuart and Erwin were then employees of AT&T. Erwin traveled to Melbourne twice. First time to view display of PRS. She discussed with Winter how to attach or where to place PRS on telephone equipment for use. She went over to Melbourne a second time in April 1986 at AT&T's expense. She was the person who demonstrated PRS at the Regional Manager's Conference in May 1984. Stuart was there, but did not do the demonstration.

14. Among persons Stuart asked to listen in on telephone conversations was Dr. McLellan. He said he listened in on a dozen-eight-ten conversations at request of Stuart and as to one of the conversations Stuart asked him to make notes. He made notes of a conversation of March 4, 1985. That conversation dealt with whether the patent had been or was likely to be granted. The other conversations were in the wintertime between 1985 and 1986—December-January (Tr. Ev. 2/14, p. 155). The witness said Winter was asking for some information on the benefit of the device, the PRS, and Stuart was explaining the major selling point would be the cost benefit to the purchaser, AT&T. McLellan continued his explanation of the conversation thusly:

> Okay, well it was a very agreeable conversation. All the conversations I heard were very agreeable if that's what you mean and there would be the usual amenities about families and about weather and everything imaginable. But, it would

also cover, of course, what the call was about, that is, exchange of information concerning the product.

In this particular case, Walt would be asking Bob the questions and Bob would elaborate with quite a detailed explanation on how you calculate the benefits by calculating the number of operators the company has, how much time, board [probably meant operator] sometime spent, what their salaries are, what the benefits are and then how much time could be saved on the reduction of this time and then come up with a cost.

And, then Walt would ask another question to clarify certain points of that and Bob would elaborate further. That was the majority of the conversation of the call. (Tr. of Ev. 2/14, p. 157)

The witness testified he never told Winter he was listening in and did not make any comments. He gave contradicting answers as to why he listened in. First, he said he listened in because as head of the Corporation for Science and Technology for the State of Indiana, the purpose of which was to fund small businesses, to give financing, guidance and seed capital, and assist it in getting started, he had an interest in this company developed in Indiana. Yet, he knew Winter and Golden were located in Florida. Second, he said he listened in because the conversations were dealing with an analysis of the patent and he could give him some advice; that Stuart just wanted some advice of a neighbor who had some experience; and he was just trying to get the gist of the patent situation. Thirdly, he said Stuart asked him to listen in because Stuart had had two heart attacks and open heart surgery, and while he was hoping to endure until the successful development of PRS, that if he should die suddenly, he wanted it to continue and wanted him to take notes and have them available that he was a partner.

On cross-examination, McLellan said he had read the benefits set out in the patent application filed April 17, 1984 and that it struck him as rather strange that Winter would be asking Stuart in 1985 to explain the benefits of the item to him. It sounds too strange to have ever happened. It is too mild to describe him as a forward witness, though he was that as the Court had difficulty in having him respond to the questions propounded, rather he focused upon becoming an advocate.

Fla. Stat. Ann. Sec. 620.585 "Partnership" defined

(1) A "partnership" is an association of two or more persons to carry on a business for profit as co-owners.

(2) An association formed under any other statute of this state, or any statute adopted by authority other than the authority of this state, is not a partnership under this part unless the association would have been a partnership in this state before the adoption of this part. This part shall apply to limited partnerships except insofar as the statutes relating to limited partnerships are inconsistent with this part.

Ind. Code Sec. 23-4-1-6. "Partnership" defined. — (1) A partnership is an association of two (2) or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this chapter, unless such association would have been a partnership in this state prior to January 1, 1950; but this chapter shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent with this chapter.

(2)

Supreme Court, U.S.
FILED
FEB 11 1993
OFFICE OF THE CLERK

No. 92-1206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT O. STUART,
Petitioner,

v.

WALTER WINTER, GOLDEN ENTERPRISES, INC., GOLDEN ENTERPRISES, INTERNATIONAL, INC., and WINTER (WALTER W.) INVESTMENTS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *Erie* doctrine is applicable where there is no conflict between federal and state law?

2. Whether a district court's determination in a bench trial that no partnership existed is an appropriate issue to review by certiorari pursuant to Supreme Court Rule 10?

3. Whether a district court's rulings on the admission of evidence at a bench trial are appropriate issues to review by certiorari pursuant to Supreme Court Rule 10?

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I.
STATEMENT OF THE CASE

A. *Course of Proceedings.*

Petitioner filed his Complaint against Respondents Walter Winter ("Winter") and Golden Enterprises, Inc. ("Golden") on July 28, 1989, alleging breach of an oral partnership agreement and requesting the district court to grant an accounting and impose a constructive trust. (R1-1). Petitioner moved for Summary Judgment on December 8, 1989. (R2-37). On February 2, 1990, the district court denied Petitioner's Motion for Summary Judgment. (R3-61). Petitioner filed a Motion to Amend its Complaint to Join Additional Parties on April 4, 1990 (R4-86) which was granted. (R4-106). Petitioner thereupon filed an Amended Complaint on April 30, 1990 (R4-122), which was answered by Respondents, who asserted affirmative defenses and counterclaims. (R7-180). On April 25, 1990, the district court entered a preliminary injunction which allowed the conduct of normal business activities, but otherwise maintained the status quo by preserving the assets of Golden pending decision of whether a partnership was formed between the parties. (R4-119). On April 30, 1990, a Stipulation and Joint Motion was filed which was granted by the court on May 2, 1990, in which all parties requested the district court to separate the issue of the existence, terms, respective rights, duties and contributions of the alleged partners (denominated "Partnership Issues") for purposes of discovery and trial from all other issues, including affirmative defenses (although the statute of frauds was later tried by consent). (R5-124; R5-N).

From February 14, 1991, through February 22, 1991, a bench trial was held before the Honorable Richard B. Kellam, Senior Judge sitting by designation, solely on the issue of whether a partnership existed between Robert O. Stuart ("Petitioner") and the Respondents. (R12-R22). On June 12, 1991, the district court entered its Opinion and Order (Petition, A4-A27) which found, *inter alia,* that no partnership was ever formed between Stuart and either Winter or Golden. On July 8, 1991, the district court entered a Final Judgment with regard to the Partnership Issues which stated that Respondents never formed a partnership or

agreed to form a partnership with Stuart at any time for any purpose. (Petition A3). Therefore, the preliminary injunction entered to preserve the assets of Golden pending trial on the Partnership Issues was dissolved. (Petition A3).

On June 26, 1991, Petitioner filed a Notice of Appeal. (R11-294). Jurisdiction in the Court of Appeals was founded upon 28 U.S.C. §§ 1291 and 1292(a). The Court of Appeals affirmed the decision of the district court on October 20, 1992, without opinion (Petition A1), pursuant to 11th Cir. Rule 36-1, which allows for an affirmance without opinion where "an opinion would have no precedential value."

B. ***Statement of Facts.***

Pursuant to Supreme Court Rule 15.1, Respondents assert that the majority of facts set out in the Petition have been misstated, because they were disbelieved by the district court. Respondents set out hereafter its statement of facts, the gist of which is set out and adopted in the district court's Opinion and Order. (Petition, A4-A27).

Winter has been involved with technical aspects of and marketing in the telephone industry since the 1970's. (R19-p.309; R20-pp.145-156). Winter formed Golden Enterprises, Inc. in 1974. (R19-p.243). Traditionally, Golden has held Board Meetings in June of each year. Winter took minutes, typed them up soon after each Board meeting and made them available for review by Board members. Furthermore, the minutes of each previous meeting were reviewed at the following annual Board Meeting. (R20-pp.161-162, 167-169; R21-pp.237, 285-286, 289-290). Winter and Golden have developed a series of devices which were designed to improve the tone of service of telephone operators. (R20-pp.145-155).

In 1982, Golden employed Dr. Kathleen Thomas as a consultant to review an instructional program developed by Golden. (R20-pp.116-119, 156-158). In reviewing the program, Dr. Thomas became acutely aware of the tedium, fatigue and

repetitive nature of the telephone operator's job. (R20-pp.119-121). In April or May of 1983, Dr. Thomas told Winter that one way of truly improving the tone of service of a telephone operator while reducing the stress, fatigue and tedium of the operator's job would be to record the operator's voice and automate the greeting phrase portion of the call. (R20-pp.120-122, 158-159). Winter reported her suggestion to the Board of Directors of Golden at its annual meeting on June 1, 1983 and tasked an engineer employed by Golden, Steve Gothard, to ascertain whether Dr. Thomas' suggestion was technologically feasible. (Def. Ex. 24; R20-p.160; R21-pp.211-212). In the summer and early fall of 1983, Golden pursued the development of the new device which was later named the Personalized Response System ("PRS"). (R21-pp.213-214).

Petitioner, Robert Stuart, had worked for Indiana Bell since 1962 in a variety of different jobs. (R13-pp.223-224). In 1983, Petitioner was a Division Manager for Indiana Bell in charge of operator services. (R13-p.226). By January, 1984, Golden had developed a PRS prototype; therefore, Dr. Thomas wrote Petitioner, now an AT&T employee, on January 20, 1984 and recommended the use of the PRS as one way of improving operator tone of service. (Def. Ex. 8; R20-pp.125-126). In late January or early February, 1984, Winter and Dr. Thomas met with Petitioner in Indianapolis. At a dinner meeting, Winter and Thomas presented in detailed fashion the PRS concept to Petitioner and one of his staff members at AT&T, Ms. Cheri Erwin ("Erwin"). (R20-pp.49-57, 122-124; R21-pp.216-217). After the meeting, Petitioner gave Erwin the job of working with Winter, on behalf of AT&T, to help develop the PRS device. (R20-pp.57-58; R21-pp.217-218).

On April 18, 1984, Golden applied for a patent on the PRS. In the early summer, 1984, AT&T's interest in the PRS accelerated. In July, 1984, Petitioner wrote to Mr. William McGowan, an AT&T division manager, and mentioned that AT&T might be interested in becoming Golden's partner in joint development of

the PRS product. (Def. Ex. 16; R15-pp.249-251). Petitioner testified that Winter was interested in having AT&T as a partner because of Golden's lack of funds. Winter also believed that the prospect of marketing the PRS would be greatly enhanced with AT&T as Golden's partner. (R15-pp.228, 251).

After AT&T evinced interest in the PRS, Petitioner began to pressure Winter to give him stock in Golden or to form a partnership with Winter and/or Golden. (R21-pp.235-236). However, Petitioner testified that he was only interested in being a stockholder or partner if the PRS achieved success. (R16-pp.35, 42-43, 51; R22-p.52). Winter told Petitioner that Golden had minority shareholders, that each shareholder was a member of the Board and had one vote, and that the Board would have to approve Petitioner's request for stock or any partnership. (R16-pp.55-56; R20-pp.169-170). On June 30, 1984, at Golden's annual Board Meeting, Winter formally conveyed Petitioner's request for stock to the other board members. The Board refused Petitioner's request for stock. (Def. Ex. 25; R21-pp.237-240). Winter told Petitioner of their refusal soon thereafter. (R21-p.239).

On August 15, 1984, AT&T convened a committee to study the PRS, which held monthly meetings. (R21-pp.248-249). However, after several trials, AT&T rejected industry-wide implementation of the PRS on January 27, 1986. (Def. Ex. 44; R15-pp.252-256; R21-pp.272-273). Petitioner continued to press Winter for Golden's stock even after AT&T rejected the PRS. Winter reported Petitioner's demands to his fellow board members at the Board of Directors' Meeting on June 14, 1986. As before, the Board rejected Petitioner's demands. (Def. Ex. 27; R21-pp.285-288). Thereafter, Petitioner wrote Winter on August 6, 1986, offering three different partnership proposals. In the letter, Petitioner requested Winter accept one of the proposals in writing by August 25, 1986, which Winter never did. (R16-pp.101-102; Def. Ex. 14). The first of two patents with respect to the PRS device was issued on November 18, 1986, with Walter Winter, John Drew and Steve Gothard, all Golden employees, named as inventors. (*See generally* Pl. Ex. 16).

II.
SUMMARY OF THE ARGUMENT

Respondents respectfully assert that this case does not fit within the parameters of Supreme Court Rule 10 which authorizes discretionary review. This case does not involve an issue where there is a conflict among the circuits, does not involve a federal question nor does it involve a departure by the district court (or the Eleventh Circuit Court of Appeals) from the accepted and usual course of judicial proceedings. Rather, this case involves a garden variety factual dispute. The recitation of the "facts" by Petitioner throughout his submission is nothing more than a repetition of the allegations claimed by Petitioner throughout the trial which were rejected by the district court. This case was deemed to have such little "precedential value" that, pursuant to local rule, the Eleventh Circuit affirmed the district court *per curiam* without opinion.

The only issue submitted to the district court for determination was whether a partnership was created between Petitioner and Respondents. In the Pretrial Stipulation, the parties stipulated that Indiana law governed the issue, and the question was posed to the district court without a jury. Under Indiana law, the question of the existence of a partnership is one of fact. The trial court heard the evidence and concluded that no partnership was formed between the parties.

Federal Rule of Civil Procedure 52(a) sets forth the standard of review for civil actions tried without a jury. Rule 52(a) mandates that findings of fact not be set aside unless clearly erroneous. Contrary to being erroneous, evidentiary support for the court's ruling is plentiful. In the five and one-half day bench trial, the district court had ample opportunity to judge the credibility of the witnesses and determine the weight to be given to the sharply conflicting evidence presented by both sides. The judge believed Respondents' witnesses, and found Petitioner's witnesses to be collectively and individually incredible.

Respondents do not believe the *Erie* doctrine is applicable or even relevant to the instant case. There is no conflict between federal and state law which would bring the *Erie* doctrine in issue. Petitioner's argument on the *Erie* doctrine is a poorly disguised effort to transform the credibility rulings of the district court into a package more likely to be accepted by this Court on a petition for writ of certiorari.

Finally, Petitioner's assertions of error in the admission of evidence by the trial judge are groundless. The assignment of error in the "admission" of Wands' testimony is curious since the testimony was not admitted, and the exclusion of patent histories due to Petitioner's failure to list them on the pretrial order was within the district court's discretion. No abuse of discretion occurred in the judge's evidentiary rulings, and such rulings are not of a nature worthy of review by this Court on a writ of certiorari.

III.
ARGUMENT AND CITATIONS OF AUTHORITY

A. *This Case Does Not Warrant Discretionary Review Under Supreme Court Rule 10.*

Under Supreme Court Rule 10, a petition for certiorari will only be granted when there are "special and important reasons." While not exclusive, this Court's rules indicate examples of when the court will exercise its discretion and issue a writ of certiorari. This case does not fit within any of those examples. The case on review does not involve an issue where there is a conflict among the circuits, does not involve a federal question, nor does it involve a departure by the district court (or the Eleventh Circuit Court of Appeals) from the accepted and usual course of judicial proceedings. Rather, this case consists of a garden variety swearing contest. The district judge was required to determine the credibility of the witnesses, and he did so. The facts were resolved by the district court contrary to Petitioner's wishes, and now the Petitioner asks this court to review those factual rulings *de novo.*

In Petitioner's direct appeal, Petitioner asked the Eleventh Circuit to review the factual determinations of the district judge *de novo,* but the Eleventh Circuit Court of Appeals properly refused. The Eleventh Circuit affirmed *per curiam* without opinion in accordance with its local rule 36-1. Eleventh Circuit Rule 36-1 provides as follows:

> 11th Cir. R. 36-1 *Affirmance Without Opinion*. When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (e) judgment has been entered without an error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

The only circumstances possibly applicable to the present case are (a) or (e). The district court and the Eleventh Circuit both correctly viewed this case as resolving a credibility issue. The credibility of the parties was determined by the district judge and the Eleventh Circuit correctly decided not to revisit his rulings. This is certainly not a case appropriate for discretionary review by way of certiorari to the United States Supreme Court.

B. *The Erie Doctrine Is Inapplicable To This Case Because There Is No Conflict Between Federal And State Law.*

Petitioner misapplies the *Erie* doctrine, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), because, as he admits, there is no conflict between federal and state law in the case on review. Petition for Writ of Certiorari, p.14. The actual issue, which the Petitioner seems only dimly to have grasped, has nothing to do

with the *Erie* doctrine. The question is whether in a bench trial involving multitudinous factual findings based on credibility, Fed.R.Civ.P. 52(a) applies, which it clearly does.

All the cases cited in the Petitioner's brief relative to the *Erie* doctrine concern conflicts between federal and state laws which have been deemed by this Court either to be procedural or substantive and are a part of a body of law which rejected the early holding of this Court in *Swift v. Tyson*, 41 U.S. 1 (1842). *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Elec. Coop., Inc.*, 356 U.S. 525 (1958); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). However, since Petitioner has admitted that in the instant case there is no conflict between Federal Rule of Civil Procedure 52(a) and any state law (Petition for Writ of Certiorari, p.14) the issues raised by the Petitioner concerning the Erie doctrine, including a revisitation of *Hanna v. Plummer,* have nothing whatsoever to do with this case.

C. *The Ruling of the Trial Court That No Partnership Was Formed Is Amply Supported By the Evidence.*

There was only one issue for determination by the district court: whether a partnership was formed between Petitioner and Respondents. Petitioner alleged a partnership was formed; Respondents asserted no partnership was created between the parties. The burden of proof was with the Petitioner to prove by a preponderance of the evidence the existence of a partnership. *Knowles v. C. I. T. Corp.*, 346 So. 2d 1042, 1043 (Fla. Dist. Ct. App. 1977). After a five and one-half day trial, the experienced trial judge found that Petitioner had not carried his burden and ruled that no partnership was formed between the parties. This ruling is clearly supported by the evidence.

Since there is no written document establishing a partnership, Petitioner had the burden of establishing a valid oral partnership with the Respondents. Under either Indiana or Florida law, a partnership is defined as requiring (1) an association of two or more persons; (2) to carry on a business; (3) for profit; (4) as co-

owners. Ind. Code § 23-4-1-6; Fla. Stat. Ann. § 620.585. Four important facts, *as found by the district judge* in his Opinion and Order (Petition A4-A28), support the determination that no partnership was formed between the parties:

1. There was no evidence of sharing costs of the alleged partnership. (Petition A21).

2. The PRS (Petitioner's alleged contribution to the partnership) was not the concept, design or product of Petitioner. (Petition A3, Petition A21).

3. Petitioner contended only one partnership was formed and that it was formed in June 1983 (Petition A18); yet, a letter written by Petitioner to Respondents over three years later on August 6, 1986, discussed the purported partnership in such a prospective and speculative fashion so as to impeach Petitioner's claims. The court concluded the letter "hardly suggests that there is already a viable partnership." (Petition A25).

4. The district court found as a fact that any assistance which Petitioner provided Respondents in the development of the PRS was pursuant to Petitioner's official position with his employer, AT&T, to improve customer service. (Petition A21).

In the Pretrial Stipulation filed in the proceedings below, the parties agreed that Indiana law would govern the issue of the existence of a partnership. (R9-235).[1] Indices of partnership that are recognized by the law of Indiana following the Uniform Partnership Act include: 1) receipt of profits from the business, *In re Zeits,* 31 N.E.2d 209 (Ind. Ct. App. 1941); and 2) contribution to losses, Unif. Partnership Act § 18(a); Ind. Code Ann. 23-4-1-18

[1] Regardless of the stipulation that Indiana law applies, (R9-235), Plaintiff at times also argues that Florida law applies. This distinction is immaterial because both Indiana and Florida have adopted the Uniform Partnership Act and the operative definition of a partnership is the same under either law. Ind. Code Ann. § 23-4-1-6 (Burns); Fla. St. Ann. § 620.585 (West).

(Burns). When seen in the light of these tests as regards to the existence of a partnership relation, Petitioner's case falls far short. Petitioner did not share in the profits of Golden (R16-p.32), nor did he share in any losses. (R16-p.32). Since a partnership agreement can commence only by the voluntary contract of the partners, Indiana law has unequivocally held that the question of the existence of a partnership is one of fact. *J.M. Schultz Seed Co. v. Robertson,* 451 N.E.2d 62, 64 (Ind. Ct. App. 1983); *Musgrave v. Madonna,* 341 N.E.2d 789, 790 (Ind. Ct. App. 1976).

The standard of review for a case tried to a district court without a jury is set out in Fed. R. Civ. P. 52(a):

> [f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The clearly erroneous standard of review was first addressed in the case of *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948). In that case, this Court stated that, "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395. Pursuant to the clearly erroneous standard of review, the district court's findings of fact are presumptively correct. Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure 2585 (1971).

This Court recently reaffirmed the clearly erroneous standard of review and explained that it is a deferential one, stating that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Amadeo v. Zant,* 486 U.S. 214, 223 (1988); *see also United States v. United States Gypsum Co.,* 333 U.S. 364; *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969).

After examining the contributions that Petitioner claims he made to the purported partnership, the district court ruled that "[a]ny assistance which Petitioner gave [with regard to the PRS] was as an employee of Indiana [Bell] and AT&T". (Petition A21). The trier of fact further found that

> [t]here is little doubt that Petitioner expressed his approval of PRS and wanted it developed for the benefit of AT&T. It was a part of his official position with the telephone companies to improve the customer service. AT&T was indeed interested for it assigned employees to work with Winter on the project and appointed a committee to attend demonstrations to determine whether or not it would be of value to the Company.

(Petition A21). The district court concluded that, "Stuart probably saw that PRS had possibilities and no doubt would like to have had some share in it, but the court is fully satisfied from the weight of the evidence that neither Winter nor Golden entered into any partnership with Stuart in June of 1983, or at any other time." (Petition A21). These findings and conclusions of the district court are consistent with the evidence, and ought not be disturbed.

It is not sufficient merely to allege, without support, as Petitioner does, that the issue of the existence of a partnership is a question of law rather than one of fact. (Petitioner Brief, p.19). To pull the district court's findings out from under the aegis of Rule 52(a), Petitioner must specify to this Court the erroneous theory of law under which the district court allegedly was operating, not just barely assert that he disagrees with the court's conclusions. *E.g., Meek v. Metropolitan Dade County,* 908 F.2d 1540, 1544 (11th Cir. 1990), cert. denied, 111 S. Ct. 1108 (1991); *City of Carrollton Branch of the NAACP v. Stallings,* 829 F.2d 1547, 1554 (11th Cir. 1987), *cert. denied,* 485 U.S. 936 (1988); *Solomon v. Liberty County, Fla.,* 899 F.2d 1012, 1018 (11th Cir. 1990), *cert. denied,* 111 S. Ct. 670 (1991).

Petitioner misreads *Uhrig v. Redding*, 8 So.2d 4 (Fla. 1942), in making his tortured analysis. *Uhrig v. Redding* stands for the well-recognized proposition *that once the facts are found,* the conclusion of whether those facts are sufficient to establish the claim is one of law. "The question to be determined is one of law — *i.e.*, whether the facts as found by the Chancellor and herein recited show that a partnership existed." *Id.* at 5. Stated differently, the existence of a partnership is based upon a series of factual findings which become a conclusion of law when taken in the aggregate. For example, if the district court found, as fact, that Petitioner and Respondents had (1) joined together (2) to carry on a business (3) for profit (4) as co-owners, it would be an error of law to conclude that no partnership existed. Here, the district court concluded that no such association was formed. Rather, the court found as a fact that while Petitioner assisted Respondents, such assistance was not in pursuit of a business as co-owners for profit, but was rather pursuant to Petitioner's official position with his employer to improve customer service for AT&T. (Petition A21). *Uhrig v. Redding* does not stand for the proposition that an appellate court can make a *de novo* review of the credibility determinations and factual findings made by the district court.

D. *The Trial Court Correctly Ruled On The Admission Of Evidence, But If There Was Error, It Was Harmless Error.*

Petitioner alleges error by the district judge in ruling on the admissibility of two items of evidence: witness testimony and two patent histories. In a nonjury trial, the judge is granted considerable latitude in the admission or exclusion of evidence. *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517 (5th Cir. 1981). The admissibility of evidence is within the sound discretion of the district court, and, even if error is found, it must rise above the threshold of harmless error. *Perry v. State Farm*, 734 F.2d 1441, 1446 (11th Cir. 1984) *cert. denied*, 469 U.S. 1108 (1985). The above standard applies in considering both of the items of evidence complained of by Petitioner, which are discussed more fully below.

1. *Testimony From Respondent's Patent Counsel Was Never Admitted.*

Petitioner contends it was error to permit Respondents' patent counsel to testify because defense counsel also asserted the attorney-client privilege to certain discovery requests. Questioning by Respondents of Golden's patent counsel, Charles Wands, at trial was entirely proper. An examination of the questions posed to Wands by the Respondents and his answers clearly show that nothing was elicited which violated the attorney/client privilege. It is axiomatic that the attorney/client privilege is not waived merely by an attorney taking the stand and testifying; waiver occurs only when the substance of a privileged communication is revealed. Charles W. Ehrhardt, *Florida Evidence* § 507.1 (1992); Fla. Stat. Ann. § 90.507 (West); *see, e.g. Seaboard Air Line Ry. v. Parker*, 62 So. 589, 590 (Fla. 1913).

More to the point, however, the testimony of Wands was never admitted. At trial, the court allowed the evidence to be put in the record, but withheld ruling on whether to consider the evidence. (R21-pp.180, 185, 189). Ultimately, the district judge never admitted the evidence, and Wands' testimony was not cited in the Court's Opinion and Order. (Petition A4-A27). *McComb v. McCormack*, 159 F.2d 219, 227 (5th Cir. 1947) (admission of testimony of Petitioner's managing executive was not prejudicial error since it was tried by the court without a jury and clear from the court's findings and opinions that he gave it no weight in his decision).

2. *Two Patent Histories Were Correctly Excluded.*

Petitioner raises the issue that it was prejudicial error for the trial court to refuse to admit in evidence patent histories of the PRS which he tendered during the cross-examination of Wands. This argument is both factually and legally flawed. From a factual standpoint, and as noted above, none of the testimony of Wands was ever admitted due to *Petitioner's* objection. Since these documents were tendered by Petitioner during that testimony, and the testimony was never admitted, no proper foundation has been laid

for admission of the documents. *Southern Stone Co. Inc. v. Singer,* 665 F.2d 698, 703 (5th Cir. Unit B Jan. 1982) (no foundation was laid for admission of document because it was hearsay and attorney didn't take stand or otherwise lay foundation for hearsay exception).

Moreover, the documents were excluded by the district court because they were not listed on Petitioner's pretrial exhibit list, as mandated by Rule 3.06(C)(4) of the Local Rules for the Middle District of Florida. Trial courts are responsible for the orderly administration of their cases, and if a party ignores the local rules on identifying witnesses and documents in their pretrial submissions, they do so at their peril. *United States v. Koziy,* 728 F.2d 1314, 1320-21 (11th Cir.) *cert. denied,* 469 U.S. 835 (1984) (district court did not abuse discretion in excluding testimony from witnesses not disclosed as trial witnesses by deadline required by the court); *Kennan v. Dow Chem. Co.,* 717 F. Supp. 799, 801 (M.D. Fla. 1989) (court granted the defendant's motion to exclude any evidence not specifically listed by the plaintiff in the pretrial stipulation).

Further, in order for error to be reversible error, it must affect a substantial right, and the party asserting error has the burden of demonstrating this fact. *Perry v. State Farm,* 734 F.2d at 1446. In this case, Petitioner has not demonstrated that admission of the patent histories would have changed the court's mind on whether a partnership existed. As such, even assuming, *arguendo,* there was error, it did not affect the outcome of the case.

IV.
CONCLUSION

The only issue submitted to the district court was whether a partnership was formed between Petitioner and Respondents. The district court found implausible and unbelievable Petitioner's claim that a partnership existed and found Petitioner was not entitled to an accounting or the imposition of a constructive trust.

The court found that Petitioner did not originate the PRS concept, did not contribute the PRS concept to any alleged partnership, and that whatever Petitioner did in furtherance of the development of the PRS he did as an AT&T employee. (Petition A21). These are factual findings which are supported by the evidence. The district court heard the evidence, observed the demeanor of witnesses and resolved the disputed issues. Applying the clearly erroneous standard to the factual issues and the abuse of discretion standard to the evidentiary issues, the Eleventh Circuit Court of Appeals affirmed the comprehensive and well-written Opinion and Order of the district court, without opinion since "an opinion would have no precedential value." Eleventh Circuit Rule 36-1. Similarly, this case does not involve any "special and important reasons" which would require review on writ of certiorari under Supreme Court Rule 10. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted this 11th day of February, 1993.

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